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# Mobile Home Mania? Protecting Procedurally Fair Arbitration in a Consumer Microcosm

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# Mobile-Home Mania? Protecting Procedurally Fair Arbitration in a Consumer Microcosm

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*What do tornados and arbitration have in common?*
*They both can be disastrous for mobile home owners!*

## I. INTRODUCTION

Why an article about arbitration of disputes involving mobile, or manufactured, homes (collectively referred to in this Article as "MH"s)?[1] Many courts and commentators have critiqued arbitration in consumer and employment contexts in which there is uneven bargaining power.[2] This Article focuses on the unique consumer microcosm of MH transactions. This is because onerous arbitration provisions in these transactions augment the burdens already threatening MHs' great potential for providing low-income

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[1] *See* NEIGHBORHOOD REINVESTMENT CORP. & THE JOINT CENTER FOR HOUSING STUDIES OF HARVARD UNIV., AN EXAMINATION OF MANUFACTURED HOUSING AS A COMMUNITY—AND ASSET—BUILDING STRATEGY 2 (2002), *available at* http://www.jchs.harvard.edu/publications/communitydevelopment/W02-11_apgar_et_al.pdf (last visited Sept. 23, 2004) [hereinafter NRC EXAMINATION]. These terms are often used interchangeably, but "manufactured homes" are factory built in accordance with the code created by the Office of Housing and Urban Development (HUD), pursuant to the 1974 Manufactured Housing Construction and Safety Standards Act (MHCSSA). *Id.* I collectively refer to mobile and manufactured homes as "MH"s for convenience. I do not include under this term "modular" or "panelized" homes built or assembled on-site. *See id.* (explaining terms).

[2] *See, e.g.*, Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449, 464–67 (1996) (critiquing FAA application in uneven bargaining contexts).

housing.[3] These arbitration provisions thwart MH safety by frustrating consumers' attempts to obtain remedies for MH defects. Furthermore, courts' strict enforcement of arbitration provisions under the Federal Arbitration Act (FAA),[4] or similar state law, has caused many MH owners to lose their homes to creditors while futilely seeking warranty remedies in arbitration.

Indeed, arbitration of MH warranty claims is ripe for reform.[5] Even the Supreme Court has grappled with consumer challenges of arbitration clauses in MH contracts.[6] This is partly due to the hybrid nature of MHs. MHs are houses in functional, financial, and emotional ways, yet are unique from site-built homes because they are factory-built on permanent chassis. Factory production makes MHs 20-30% less expensive than comparable site-built units, even taking into account MH transportation and installation costs.[7] MHs, therefore, have become an important source of housing for individuals with low incomes. MHs' mobility, however, also subjects them to personal property warranty and finance laws geared to govern widgets, not homes.

To make matters worse, MH sales resemble "old-fashioned, high-pressure auto deal[s]," which often involve stark power differentials between "insider" manufacturers, retailers, and lenders and "outsider" consumers.[8]

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[3] *See* MANUFACTURED HOUSING RESEARCH ALLIANCE, TECHNOLOGY ROADMAPPING FOR MANUFACTURED HOUSING 1–14 (2003) [hereinafter ROADMAPPING]. "Affordable housing" is a debatable label, but I use it in this Article to generally refer to homes that are within the budgets of many low-income consumers.

[4] Federal Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended in scattered sections of 9 U.S.C. (2000)).

[5] *See infra* Part I.B (discussing the plight of MH owners). This Article focuses on MH arbitration but similar arguments apply in the larger debate regarding consumer and employment arbitration.

[6] *See, e.g.*, Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 447–54 (2003) (eluding the question of whether Green Tree can contractually preclude class relief through its arbitration clauses in MH contracts by holding that arbitrators must first determine whether the clauses preclude class arbitration); Green Tree Fin. Corp. v. Randolph, 531 U.S. 79, 90–91 (2000) (finding that Truth in Lending Act (TILA) claims under a MH financing agreement may be subject to binding arbitration under the FAA, and consumer had failed to prove that arbitration would be prohibitively expensive); *see also infra* Part IV (discussing courts' struggles with enforcement of arbitration agreements).

[7] NRC EXAMINATION, *supra* note 1, at 2–3. A 1998 HUD study indicated that building a 2,000-square-foot MH costs 61% as much as a comparable site-built home. *Id.* at 2.

[8] Kathy Mitchell, *In Over Our Heads: Predatory Lending and Fraud in Manufactured Housing*, CONSUMERS UNION SW. REG'L OFFICE PUBLIC POLICY SERIES, No. 1, at 2 (2002), *at* http://www.consumerunion.org/pdf/mh/over/report.pdf (last visited Sept. 23, 2004). For purposes of simplicity, I use "MH insiders" to refer to MH

Many MH insiders use this power to impose onerous form arbitration provisions in consumer contracts.[9] These provisions often curtail or extinguish consumers' statutory warranty rights. They also may restrict consumers' contract remedies, but allow lenders to judicially foreclose on MHs.[10] Consumers then risk losing their homes in court while struggling to arbitrate warranty claims.

That is not to say that arbitration is inappropriate for resolving MH warranty disputes. Arbitration can be a flexible process that eases judicial caseloads and provides more disputant satisfaction than litigation.[11] Arbitration also may foster efficiency, which insiders may pass on to consumers through lower prices. Insider-controlled arbitrations, however, should preserve consumers' access to remedies for MH defects. Furthermore, current uncertainties regarding which arbitration procedures will withstand judicial scrutiny in MH cases sap arbitration efficiencies and augment threats to MHs' affordable housing potential.[12]

Concern regarding consumers' lack of access to warranty remedies prompted Congress to enact the Manufactured Housing Improvement Act of 2000 (MHIA).[13] The Act calls for the Office of Housing and Urban Development (HUD) to establish a program for resolving disputes among MH manufacturers, retailers, and installers regarding responsibility for repair of MH defects that are reported within one year of MH installation.[14] Each state must implement a program in compliance with HUD standards by

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manufacturers, lenders, and retailers as a general group, recognizing all parties falling under this umbrella are not necessarily industry savvy, and do not necessarily enjoy strong bargaining power.

[9] *Id.* at 10; *see also* NRC EXAMINATION, *supra* note 1, at 2–19.

[10] *See infra* notes 114–25 and accompanying text (discussing insider-imposed provisions).

[11] *See, e.g.*, Cameron L. Sabin, *The Adjudicatory Boat Without a Keel: Private Arbitration and the Need for Public Oversight of Arbitrators*, 87 IOWA L. REV. 1337, 1359–62 (2002) (debating the efficiencies of arbitration); Jeffrey W. Stempel, *Pitfalls of Public Policy: The Case of Arbitration Agreements*, 22 ST. MARY'S L.J. 259, 265–69 (1990) (identifying the benefits of arbitration); Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 708–11 (1999) (discussing the roles of private choice in arbitration).

[12] *See infra* Part IV (explaining disagreement of courts).

[13] Manufactured Housing Improvement Act of 2000, Pub. L. No. 106-569, 114 Stat. 2997 (codified as amended in scattered sections of 42 U.S.C.) (amending the National Manufactured Housing Construction and Safety Standards Act of 1974 (MHCSSA)).

[14] *Id.* § 610.

December 2005 or HUD will impose a program in that state.[15] On March 10, 2003, HUD requested comments on all aspects of the program, including who and what claims the program should include, what dispute resolution process it should employ, and what procedures that process should require.[16]

This Article provides input regarding the HUD program. It also calls for broader protection of procedural fairness in arbitration of MH disputes. Although the HUD program aims to create a process for resolving intra-industry disputes among manufacturers, dealers and installers, this Article proposes that Congress expand the MHIA's aim to require minimum procedural and remedial standards for arbitration of MH consumer warranty disputes. This is not, therefore, a call for abolition of arbitration agreements. Generally, contractual liberty supports parties' freedom to craft arbitration provisions suited to their transactional needs and contexts. The unique burdens affecting MH consumers, however, justify creation of mandatory minimum standards for arbitration of MH warranty claims. These standards should not eviscerate contractual liberty or undercut efficiencies that make MHs an affordable home-ownership option. They nonetheless should preserve fair and affordable means for consumers to obtain remedies for MH defects.

Part II of this Article explains why MH transactions comprise a unique microcosm of consumer contracts. As Congress acknowledged in adopting the MHIA, complexities and burdens of MH ownership are jeopardizing the potential of MHs within the low-income housing market. Part III discusses how some MH insiders' use of form arbitration agreements augments these burdens by curtailing consumers' warranty rights and remedies, and adding to financing risks. In Part IV, the Article explores courts' struggles with these arbitration provisions. Consumers' continual challenges of these provisions produce uncertain results and sap arbitration's efficiency benefits. Accordingly, Part V sets forth options for addressing MH consumers' inadequate access to warranty remedies. Part VI proposes that policymakers adopt minimum fairness standards for arbitration of MH consumer claims that seek to protect consumers' MH remedies without draining the efficiency benefits of arbitration. This proposal is by no means a recipe for the perfect resolution of MH claims. Nonetheless, it hopes to spark consideration of procedural reforms for MH arbitrations, and perhaps for other uneven bargaining contexts as well.

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[15] *Id.*

[16] Manufactured Housing Dispute Resolution Program: Advance Notice of Proposed Rulemaking, 68 Fed. Reg. 11,456 (proposed Mar. 10, 2003) (to be codified at 24 C.F.R. pt. 3286) [hereinafter HUD Notice].

## II. WHY MH TRANSACTIONS COMPRISE AN IMPORTANT MICROCOSM OF CONSUMER CONTRACTS

MHs serve an important niche in the housing market.[17] They provide an opportunity for low-income families to enjoy the amenities of homeownership that these families may not be able to afford in the traditional real estate market. Furthermore, MHs may be the only option for low-income housing where rental and subsidized housing is scarce.[18] Congress recognized MHs' potential for affordable housing in adopting the MHIA, calling on HUD to strengthen MH safety standards and promote the effective resolution of MH warranty disputes. Complexities and burdens of MH ownership, however, threaten this potential. In addition, personalty legal regimes awkwardly govern MH transactions, while many MH consumers fall prey to high-pressure sales, onerous financing, poor warranty protections,

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[17] *See* Amy J. Schmitz, *Promoting the Promise Manufactured Homes Provide for Affordable Housing*, 13 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 384, 385–87, 395–99 (2004) (emphasizing the importance of MHs in the affordable housing market and seeking to spark policymakers' awareness regarding warranty and financing issues that threaten MHs' potential).

[18] *See* Kevin Jewell, *Manufactured Housing Appreciation: Stereotypes and Data*, CONSUMERS UNION, at 2 (2003), *at* http://www.consumersunion.org/pdf/mh/Appreciation.pdf (last visited Oct. 3, 2004) [hereinafter *MH Appreciation*] (undertaking a study of MH appreciation in order to promote homeownership for low-income families); *see also* Kevin Jewell, *Raising the Floor, Raising the Roof: Raising Our Expectations for Manufactured Housing*, 6 CONSUMER'S UNION SW. REG'L OFFICE PUBLIC POLICY SERIES, No. 5, at 1 (2003), *at* http://www.consumersunion.org/other/mh/raising/raising-exe.htm (last visited Oct. 3, 2004) [hereinafter *Raising the Floor*] (addressing problems that prevent MHs from reaching their full potential for low-income families); ROADMAPPING, *supra* note 3, at 7–9 (emphasizing the importance of MHs in providing housing to those who would otherwise be unable to own homes). MH ownership, however, can sometimes turn into a nightmare due to MH defects. *See Dream Home or Nightmare*, 63 CONSUMER REP. 2, Feb. 1998, at 30 [hereinafter *Dream Home*].

and zoning restrictions.[19] This has led some MH communities to suffer the ills that traditionally have paralyzed inner-cites.[20]

## A. *Importance of MHs to the Housing Market*

### 1. *Unique Housing Opportunities Provided by MHs*

Only 24.1% of households in the United States can afford to purchase an average site-built home, and the nation's stock of cheap rental and subsidized housing continues to dwindle.[21] Low-income families may be able to purchase MHs, however, because they cost about half as much as conventional homes.[22] MHs, therefore, accounted for 72% of new low-income housing from 1997 to 1999.[23] This makes MHs the only viable homeownership option for many with very low incomes. [24] This also makes MHs an important source of housing for many first-time homebuyers and retirees.[25] Young families, especially single-parent households, purchase

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[19] *See Raising the Floor*, *supra* note 18, at 1, 24–25 (emphasizing the opportunities for MH owners to build equity in their homes and enjoy the other benefits enjoyed by owners of conventional homes); *see also* Wendy Schermer, Case Note, *Mobile Homes: An Increasingly Important Housing Resource that Challenges Traditional Land Use Regulation*—Geiger v. Zoning Hearing Board of North Whitehall, 60 TEMP. L.Q. 583, 594–97 (1987) (discussing adherence to traditionally poor perceptions of MHs as aesthetically displeasing drains on public resources).

[20] *See* NRC EXAMINATION, *supra* note 1, at 5–10. *But see* Cheryl P. Derricotte, *Poverty and Property in the United States: A Primer on the Economic Impact of Housing Discrimination and the Importance of a U.S. Right to Housing*, 40 HOW. L.J. 689, 700–01 (1997) (noting concern regarding MHs because they "offer little in the way of wealth accumulation").

[21] ROADMAPPING, *supra* note 3, at 7 (noting a $212,300 average home price in 2001).

[22] *Id.* at 8.

[23] *Id.*; *cf. Dream Home*, *supra* note 18, at 32 (reporting that the median household income of MH dwellers in 1995 was $22,578, compared with $31,416 for all households nationally); Richard Genz, *Mortgage Lending for Manufactured Homes: Maine State Housing Authority's Experiment*, Neighborhood Reinvestment Corp., at 11 (2002), *at* http://www.floridahousing.org/ahsc/2003%20Study%20Agenda%20Docs/b_1_Maine%20MSHA%20MH%20Report-Genz.pdf (last visited Sept. 23, 2004) [hereinafter *Mortgage Lending*] (reporting median MH borrower income was $29,922, which was 66% of the statewide family median).

[24] *See* ROADMAPPING, *supra* note 3, at 7.

[25] *See* NRC EXAMINATION, *supra* note 1, at 9–10 (noting the continued dominance of first-time and retired homebuyers in the MH market but speculating that emergence of more high-end MHs will spark MH purchasing among middle-income families).

MHs because they provide easy entry into the housing market.[26] In addition, MH ownership among African Americans and Latinos far exceeds MH ownership among whites.[27] Meanwhile, conventional homeownership rates among Latinos and African Americans have slipped, or remained unchanged, and lag well below the rates for whites.[28]

MHs also offer families community-building opportunities. Unlike apartments, MHs generally provide the privacy and amenities usually associated with conventional homeownership. MH communities foster interaction among residents because they often include shared parks or meeting areas. In addition, MH owners may forge communal connections because they are generally less transient than apartment dwellers.[29] After owners place their MHs, they very rarely move them.[30]

Families may choose MH living because they cannot afford average rent, or fail to qualify for rental assistance or subsidized housing. Two minimum wage workers struggle to afford a two-bedroom apartment.[31] This may mean that the government should augment rental assistance programs. It might be more efficient and cost-effective, however, for policymakers to promote MH ownership than to expand public liability for housing programs.[32] One study concluded "that a substantial number of people are being adequately housed

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[26] *Id.* at 10.

[27] "In fact, Latino and African-American manufactured-home ownership grew at compound annual growth rates of 6.1 and 4.6 percent, respectively, for the 1985 to 1999 period, well above whites' 2.3 percent." *Id.* In Texas, for example, nearly half of the state's MHs house Hispanic families. *See* Mitchell, *supra* note 8, at 16.

[28] *See* NRC EXAMINATION, *supra* note 1, at 10. In addition, financial assistance for housing is unavailable to most aliens. 42 U.S.C. § 1436a (2003). Under federal law, aliens receive no financial assistance unless they are residents lawfully admitted for permanent residence or fit another specified category. *Id.*; *see also* Mathews v. Diaz, 426 U.S. 67, 79–85 (1976) (holding that Congress has no duty to provide all aliens with the same benefits provided to citizens); Graham v. Richardson, 403 U.S. 365, 372–73 (explaining that states may, under some circumstances, discriminate in providing assistance and resources to noncitizens).

[29] *See* Roger Colton & Michael Sheehan, *The Problem of Mass Evictions in Mobile Home Parks Subject to Conversion*, 8 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 231, 233 (1999).

[30] *Id.* at 233–34 (reporting study findings that "upwards of 80%" of MH park residents have remained in their first MH, and approximately 1% of MHs are ever moved during their lifetimes).

[31] ROADMAPPING, *supra* note 3, at 7.

[32] Colton & Sheehan, *supra* note 29, at 235.

in their own homes [through MHs] at values-per-unit that could not be duplicated in either private or public low-income housing markets."[33]

Consumers also turn to MHs for shelter in areas where rental housing is scarce.[34] This is especially true in southern states. In South Carolina, for example, MHs account for over one-half of new home sales.[35] Furthermore, the scarcity of rental housing is particularly acute in rural areas.[36] This is problematic despite lower populations in these areas because federal and state policies are often so focused on urban housing problems that they neglect rural housing difficulties.[37] Indeed, policymakers cannot ignore rising safety and financing burdens that threaten MHs' ability to fill niche needs in the low-income housing market.

### 2. *Congressional Concern for Protecting the Housing Potential of MHs*

Prior to 1974, policymakers did little to protect the quality and safety of MHs, and haphazard state regulations threatened production efficiencies.[38] The federal government, therefore, enacted the 1974 Manufactured Housing Construction and Safety Standards Act (MHCSSA).[39] Pursuant to the Act, HUD has developed fairly loose MH safety and construction standards that do not cover problematic areas such as installation and warranty dispute resolution.[40] These standards aim to contain MH manufacturing costs,[41] and

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[33] Accordingly, if policymakers do not protect this source of housing, the public will have to bear the costs of increasing government housing assistance and availability of subsidized housing. *See id.*

[34] ROADMAPPING, *supra* note 3, at 7.

[35] H. Guyton Murrell, *Mortgages on Mobile Homes: How Secure is Your Secured Interest?*, 11 S.C. LAW. 40, 41 (2000).

[36] *See* Debra Lyn Bassett, *Ruralism*, 88 IOWA L. REV. 273, 319–21 (2003).

[37] *Id.* at 320–21.

[38] *See* Neal R. Peirce & Patti Leitner, *Mobile Homes May Have Come of Age, But Builders Say Regulations Haven't*, 14 THE NAT'L J. 913, 913–14 (1982).

[39] *Id.* at 913–14. *See generally* Gianakakos v. Commodore Home Sys. Inc., 727 N.Y.S.2d 806, 808 (N.Y. App. Div. 2001) (dismissing a claim that MH violated state MH construction and safety regulations to the extent that the federal standards preempted state regulations).

[40] *See Dream Home*, *supra* note 18, at 31, 34 (lamenting weaknesses of HUD MH standards and HUD's failure to comprehensively review these rules for the past 23 years); *see also* Peirce & Leitner, *supra* note 38, at 914.

incorporate the MH industry's practice by adopting about 85% of their chosen code.[42] Some complain that these standards do not adequately protect MH dwellers with respect to fire and wind safety, energy efficiency, warranty regulation, and chemical usage in MH production.[43] Moreover, consumers struggle to obtain remedies for defects and deficient warranty service due to the "blame game" MH dealers, manufacturers, and installers play to escape liability for MH defects.[44] With MH insiders blaming each other for warranty problems, no party accepts responsibility for fixing defects.

This criticism of the MHCSSA sparked Congress to enact the MHIA.[45] The MHIA aims to provide fair and efficient means for resolving warranty claims, and mandates the development of regulations for safe installation of MHs. With respect to dispute resolution, the MHIA seeks to end the "blame game" among MH insiders.[46] It requires each state to implement "a dispute resolution program for the timely resolution of disputes between manufacturers, retailers, and installers of manufactured homes regarding responsibility, and for the issuance of appropriate orders, for the correction or repair of defects in manufactured homes that are reported during the 1-year period beginning on the date of installation."[47] If a state fails to implement such a program by December 2005, then HUD must mandate program

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[41] *See* Peirce & Leitner, *supra* note 38, at 913–14. HUD has been caught in the struggle between consumers calling for more stringent regulations and industry groups warning that stricter regulations will exclude buyers from the market. *Id.*

[42] *See id.* (reporting on the emphasis on cost-savings pursuant to revisions that began in 1979); *see also Dream Home*, *supra* note 18, at 34 (lamenting the weaknesses of HUD's MH standards).

[43] Peirce & Leitner, *supra* note 38, at 914 (noting complaints that "[w]hatever industry wants, industry gets").

[44] In the early 1980s, the FTC reported that warranty service problems were "a persistent and widespread problem." *Id.* (noting lack of warranty remedies for common defects such as leaky roofs, buckling walls and sagging floors, as well as for major health concerns caused by chemicals used in MH production that cause respiratory and other problems for MH dwellers).

[45] Manufactured Housing Improvement Act of 2000, Pub. L. 106-569, 114 Stat. 2997 (codified as amended in scattered sections of 42 U.S.C.) (amending the MHCSSA).

[46] 42 U.S.C. § 5422(g) (2000); *see also* HUD Notice, *supra* note 16, at 11,452–53 (describing general parameters of the dispute resolution program, and calling for input regarding specifics).

[47] 42 U.S.C. § 5422(c)(12).

requirements.[48] HUD is in the early stages of gathering input regarding all aspects of the program.[49]

## B. *Complexities and Burdens Affecting MH Transactions*

### 1. *The Law's Failure to Respond to Warranty and Financing Difficulties*

MHs stand at the crossroads of real and personal property. Although owners rarely relocate their MHs after placement, the law often treats them as personalty because they are factory built and moved to a resting site.[50] Accordingly, courts generally hold that MH purchases are sales of goods, governed by states' adoptions of Article 2 of the Uniform Commercial Code (UCC) instead of real estate law.[51] In addition, MHs generally remain personalty because most owners place them on rented land or do not sufficiently affix them to owned land. This means that, instead of real estate mortgage and recording statutes, UCC Article 9 and/or state certificate of title (COT) laws generally govern securitization of MH financing.[52]

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[48] 42 U.S.C. § 5422(g) (stating that HUD may implement the program itself or through an appropriate agent).

[49] In addition to the MHIA dispute resolution provisions, the Act created a private-sector consensus committee to recommend and update HUD MH quality and manufacturing standards. The Act also requires states to establish installation standards that meet HUD's minimum requirements. 42 U.S.C. §§ 5404, 5422; *see also* Manufactured Housing Institute, *Summary of the Manufactured Housing Improvement Act P.L. 106-569*, *at* http://www.mfghome.org/lib/showtemp_detail01.asp?id=106&cat=govt (last visited Sept. 23, 2004). Some have voiced concern that MH insiders will control HUD's creation of these installation standards. *See* Peirce & Leitner, *supra* note 38, at 914 (noting the dominance of MH insiders).

[50] *See supra* text accompanying notes 6–7 (defining MHs as factory-built on chassis); *see also* NRC EXAMINATION, *supra* note 1, at 2.

[51] 1 BARKLEY CLARK & CHRISTOPHER SMITH, THE LAW OF PRODUCT WARRANTIES § 2:26 (2003).

[52] *See* George v. Commercial Credit Corp., 440 F.2d 551, 553–54 (7th Cir. 1971) (applying Wisconsin law's tests for determining when MHs become realty, focusing on physical annexation to land, adaptation to that land, and parties' intent to affix personalty to the land); *see also* 11 RONALD A. ANDERSON & LARY LAWRENCE, ANDERSON ON THE UNIFORM COMMERCIAL CODE § 9-102:76 (3d ed. 1999) (defining "manufactured-home transaction" as "a secured transaction in which the home is the primary collateral or in which the secured creditor has a purchase-money security interest"); Larry T. Bates, *Certificates of Title in Texas Under Revised Article 9*, 53 BAYLOR L. REV. 735, 754–56

### a. *Weakness of Personal Property Warranty Protections*

Courts hold that the U.S. Constitution does not guarantee decent housing.[53] Federal and state real estate programs nonetheless promote safety protections and increased financing options for conventional homes.[54] In addition, both UCC and real estate warranties aim to protect safety.[55] Parties also may contractually create express warranties,[56] and contract defenses protect consumers from fraudulent or unconscionable agreements.[57]

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(2001) (discussing application of Texas Certificate of Title laws to MHs). In many states, MH owners and lenders must comply with state certificate of title laws specific to MHs, or to those generally applicable to motor vehicles. *See* Conseco Fin. Servicing Corp. v. Old Nat'l Bank, 754 N.E.2d 997, 1001–02 (Ind. App. 2001) (noting confusion due to MHs' classifications as a "good" or a "fixture" depending on affixation to land). MHs only become fixtures or real property when owners permanently affix them to their own land. 9 ANDERSON & LAWRENCE, *supra*, § 9-313:8 (explaining that MHs are not fixtures when placed on leased land in MH parks).

[53] *See* Derricotte, *supra* note 20, at 705–08 (noting the "crisis level" lack of safe and affordable housing in the United States and subsequently proposing a Constitutional amendment guaranteeing the right to housing as a necessary remedy).

[54] *See* Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1072–83 (D.C. Cir. 1970) (discussing Congressional enactment of housing and sanitary codes for real estate and implying a warranty of habitability in all such housing leases); Hilder v. St. Peter, 478 A.2d 202, 207–11 (Vt. 1984) (discussing the evolution of real estate law to protect the overriding interest in "safe, sanitary and comfortable housing," and explaining the warranties and remedies thus available under state law).

[55] *See* 1 CLARK & SMITH, *supra* note 51, § 2:26 (stating that, with respect to the warranties of merchantability under the UCC and of habitability under real estate law, "[t]he legal results are pretty much the same"); *Javins*, 428 F.2d at 1072–82 (recognizing an implied warranty of habitability in the landlord/tenant context and warranty of fitness in home construction contracts); Gianakakos v. Commodore Home Sys. Inc., 727 N.Y.S.2d 806, 808 (N.Y. App. Div. 2001) (applying UCC Article 2 to contract for purchase of a MH).

[56] U.C.C. § 2-316 (2004); *see also* Davis v. Tazewell Place Assoc., 492 S.E.2d 162, 163–66 (Va. 1997) (holding enforceable an express warranty of workmanlike quality regarding construction and sales of a townhome); Rouse v. Brooks, 383 N.E.2d 666, 668–69 (Ill. App. Ct. 1978) (holding that express warranties in real estate purchase agreement did not merge with the deed, but finding the parol evidence rule excluded a claim for breach of an alleged oral warranty made by the sellers prior to the execution of the purchase agreement).

[57] *See Ex parte* Thicklin, 824 So. 2d 723, 730–31 (Ala. 2002) (finding contract law defenses such as unconscionability may be applied to invalidate an arbitration agreement contained in a MH contract within the scope of the FAA); Snow v. Corsica Constr. Co., 329 A.2d 887, 888–89 (Pa. 1974) (noting that a contract to convey real estate may be

Nonetheless, real estate law is more protective than general personalty law of housing safety. Conventional homeowners also seem to enjoy more bargaining power than MH consumers to prevent contractual dissipation of warranty protections. For example, courts have established common law liability for implied warranties of habitability in home construction contracts that extend to parties beyond immediate home sellers.[58] Many courts, however, preclude consumers from recovering against manufacturers for economic losses due to breach of UCC implied warranties in the absence of contractual privity.[59] In addition, MH consumers must share privity with manufacturers to recover against them for economic losses under strict liability in tort.[60] In contrast, many courts do not require conventional homeowners to show privity in order to recover economic losses due to latent home defects that constitute breach of warranty of habitable construction.[61] Also, courts may more readily enforce warranty disclaimers under UCC Article 2[62] than under state real estate law.[63]

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unenforceable where there is evidence of "fraud or imposition" that would make it unjust to enforce the contract).

[58] *See* Bethlahmy v. Bechtel, 415 P.2d 698, 706–11 (Idaho 1966) (applying an implied warranty of habitability in realty contract); Waggoner v. Midwestern Dev., Inc., 154 N.W.2d 803, 805–09 (S.D. 1967) (holding that there exists an implied warranty of habitability and "reasonable workmanship" that remains in effect subsequent to deed delivery).

[59] *See* Nobility Homes of Tex., Inc. v. Shivers, 557 S.W.2d 77, 80–81 (Tex. 1977) (finding that a MH purchaser could recover for personal and economic losses due to defects where there was privity), *questioned in* Rocky Mountain Helicopters, Inc. v. Bell Helicopters Textron, Inc., 24 F.3d 125, 129–30 (10th Cir. 1994); Flory v. Silvercrest Indus., Inc., 633 P.2d 383, 387–89 (Ariz. 1981) (finding lack of privity precluded recovery for economic losses by MH consumers who lost their home while failing to obtain any remedies from the manufacturers regarding defects).

[60] *See Flory*, 633 P.2d at 388 (finding that, privity of contract unnecessary under strict liability for recovery of physical injury to person or property, but requiring that privity to recover economic losses under that theory); *Nobility Homes of Tex., Inc.*, 557 S.W.2d at 78–80 (finding that even if economic losses are recoverable for breach of implied warranty under the UCC without privity, such recovery is not available under strict liability).

[61] Barnes v. Mac Brown & Co., 342 N.E.2d 619, 620–21 (Ind. 1976) (extending warranty protections to subsequent purchasers without contractual privity).

[62] *See* 1 CLARK & SMITH, *supra* note 51, § 2:26 (noting that Article 2 defenses to warranty liability clearly apply to MH transactions). Although sellers may limit or exclude warranty liability under real estate law, it seems Article 2 law may be more clear with respect to such limitations. *See* Rawson v. Conover, 20 P.3d 876, 886–87 (Utah 2001) (holding implied and express warranties destroyed when van purchase contract disclaimed all warranties); DeGrendele Motors, Inc. v. Reeder, 382 S.W.2d 431, 434

Consumer groups complain that warranty laws do not adequately protect MH safety. They charge that manufacturers focus on cutting MH construction costs to the detriment of home quality.[64] A survey conducted by the Consumer Union in November 2002 indicated that 79% of new MH owners had experienced problems with their MHs.[65] Consumers lament poor warranty repair service and weak HUD enforcement of federal construction and safety standards.[66] Consumers also file a relatively high number of complaints with the Council of Better Business Bureaus (BBB) against MH-related businesses.[67] The level of complaints led the BBB to implement a

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(Mo. Ct. App. 1964) (per curiam) (enforcing express disclaimer of warranties in a car purchase order). Still, U.C.C. § 2-316 requires that any waiver of the implied warranty of merchantability must mention "merchantiblity" and be conspicuous if in writing. *But see* Hartman v. Jensen's, Inc., 289 S.E.2d 648, 649 (S.C. 1982) (denying enforcement of an ambiguous warranty disclaimer in MH sale).

[63] *See* Briarcliffe West Townhouse Owners Ass'n v. Wiseman Constr. Co., 480 N.E.2d 833, 838 (Ill. App. Ct. 1985) (holding that a real estate warranty disclaimer is invalid unless it is "so clear and so conspicuous that no other reasonable conclusion could be reached but that the buyer both read and understood the language"); Schoeneweis v. Herrin, 443 N.E.2d 36, 41–42 (Ill. App. Ct. 1982) (finding that an "as is" clause in a real estate contract did not disclaim implied warranties of habitability where it did not refer to a particular warranty and was not explained); Hilder v. St. Peter, 478 A.2d 202, 208–09 (Vt. 1984) (stating that the implied warranty of habitability is not waivable by an express or oral agreement in a residential lease). *But see, e.g.*, Lenawee County Bd. of Health v. Messerly, 331 N.W.2d 203, 211 (Mich. 1982) (finding that "as is" disclaimer applied to defects unknown at the time of contracting and thus was enforceable as to a malfunctioning sewage system).

[64] *Raising the Floor*, *supra* note 18, at 1 (finding further that "homes are often sold on floor plan and visual appeal rather then durability and quality").

[65] *Paper Tiger, Missing Dragon: Poor Service and Worse Enforcement Leave Manufactured Homeowners in the Lurch*, CONSUMERS UNION, *at* http://www.consumersunion.org/other/mh/paper-info.htm, at 2 (last visited Oct. 3, 2004) [hereinafter *Paper Tiger*].

[66] *Id.* at 11. *See also Study: Persistent Problems in Manufactured Home Warranty Service and Enforcement Provoke Customer Ire*, CONSUMERS UNION, *at* http://www.consumersunion.org/other/mh/paper-pr.htm (Dec. 4, 2002) (last visited Aug. 14, 2004) (reporting a high percentage of dissatisfied MH purchasers due to prevalent defects and "ineffective regulation of the manufactured housing industry").

[67] The 2002 table of consumer complaints provided on the website for the national BBB council also indicates 2,192 total complaints against businesses categorized as MH "Parks," "Services," "Equip & Parts," "Rent & Lease," "Transporting," or as "Mobile/Modular/Manufactured Housing Dealers." *2002 Summary of Complaints*, COUNCIL OF BETTER BUSINESS BUREAUS, *at* http://www.dr.bbb.org/Drresults/2002WebComplaints_TOB.pdf (last visited Oct. 16, 2003) (noting that this last category ranked 85th among the thousands of business

program for informal resolution of consumers' warranty-related disputes against MH manufacturers.[68] At this stage, however, it appears that only two MH manufacturers have agreed to participate in the BBB program.[69]

Consumers struggle to obtain remedies for MH warranty problems. MH manufacturers and dealers often impose contract terms that exclude or limit warranties, exclude consequential damages for breach of warranty, severely cap direct damages, and/or limit consumers' remedies to repair.[70] Some warranties also exclude coverage of important items, including wall cracks, leaky faucets, defective doors, and faulty windows.[71] Furthermore, manufacturers' warranties generally do not cover defects caused by faulty installation, although regulators report that faulty installation accounts for over half of reported MH problems.[72]

Policymakers must make safe and adequate housing a priority.[73] MH dwellers should, therefore, have reasonable access to remedies and repairs essential to the safety of their homes.[74] This means they should not lose

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categories targeted with complaints). This table captures only a small fraction of total complaints, however, because it reports only complaints filed with the national BBB. Furthermore, the table does not list a MH manufacturer category.

[68] *Right at Home*, BBB DISPUTE RESOLUTION WEBSITE, *at* http://www.dr.bbb.org/programs/rah.asp (2003) (last visited Aug. 27, 2004).

[69] *Dispute Resolution Opportunities*, BBB DISPUTE RESOLUTION WEBSITE, *at* http://www.dr.bbb.org/programs/index.asp (2003) (last visited Aug. 27, 2004) (reporting limited participation by American Homestar and Cavalier Homes).

[70] *Manufactured Housing: Buying Guide Brochure, Consumers Union's Tips on Mobile Homes*, *at* http://www.consumersunion.org/other/mh/brochure.htm, at 9–10 (last visited Aug. 14, 2004) [hereinafter *Tips*] (reporting common warranty exclusions and limitations).

[71] *Id.* at 11.

[72] *See Dream Home*, *supra* note 18, at 31 ("Installation can be a serious safety issue for manufactured housing."). While it may seem cliché to mention tornados' destruction of MHs, the reality is that MHs are especially vulnerable to severe storm damage because they often are not properly anchored to the ground during installation. *Id.* at 34; *see also Tips*, *supra* note 70, at 11 (noting items that may void warranties).

[73] *See* Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1075–77 (D.C. Cir. 1970) (extending the implied warranty of habitability to tenants of real estate); King v. Brace, 552 A.2d 398, 399 (Vt. 1988) (holding that a MH tenant may recover under an implied warranty that ensures "safe, clean and fit" premises for habitation).

[74] Hilder v. St. Peter, 478 A.2d 202, 207 (Vt. 1984) (stating that caveat lessee should no longer be imposed).

access to defect remedies due to arduous and expensive arbitration provisions.[75]

### b. *MH Financing Woes*

Differences between MH and real estate lending significantly contribute to MH contracting and arbitration issues.[76] MH consumers generally lack access to the conventional home financing market because MHs are not permanently affixed to land owned by the MH owner.[77] Instead, these consumers finance the purchase of their MHs with subprime or personal property loans.[78] These MH loans are generally limited and expensive.[79] They are not backed by the strong secondary market that has developed to increase accessibility and safety of real estate financing.[80] Instead, state COT laws and UCC Article 9 (governing MHs) aim to simplify and expand lenders' securitization rights.[81]

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[75] *See infra* Part II.B.2.b (discussing one-sided procedures MH insiders generally include in form arbitration provisions).

[76] *See* Mitchell, *supra* note 8, at 12 (discussing and reporting findings regarding predatory financing in the MH industry). Full discussion of these differences is beyond the scope of this Article.

[77] *See* DAVID S. HILL, BASIC MORTGAGE LAW: CASES AND MATERIALS 1–38 (2001) (providing an introduction to basic real estate transactions).

[78] *See* Derricotte, *supra* note 20, at 701. In 2000, roughly 78% of new MHs were financed with chattel loans instead of conventional mortgages. *See also Mortgage Lending*, *supra* note 23, at 2 (stressing disadvantages caused by limited financing options).

[79] *See* Derricotte, *supra* note 20, at 701 (lamenting the lack of banking industry or federal program attention to the limited and high-risk financing of MHs).

[80] *See* HILL, *supra* note 77, at 35–38 (describing the basics of the secondary market). The Secretary of HUD has authorized limited federal insurance programs aimed to promote MH financing. 12 U.S.C. § 1703 (2003); *see also* Peirce & Leitner, *supra* note 38, at 915 (noting that HUD had attempted to spark MH lending by insuring lenders subject to limitations and restrictions). However, most mortgage lenders have stayed out of the MH lending market due to relatively small loan sizes, less-qualified borrowers, reports of MH depreciation, and complexities of lending on leased land. *Mortgage Lending*, *supra* note 23, at 2.

[81] *See* 11 ANDERSON & LAWRENCE, *supra* note 52, § 9-102:76R (defining MH transactions as secured transactions under UCC Article 9); Edwin E. Smith, *An Introduction to Revised UCC Article 9*, *in* THE NEW ARTICLE 9 UNIFORM COMMERCIAL CODE 17–58 (Corinne Cooper ed., 2d ed. 2000); Richard L. Barnes, *Toward a Normative Framework for the Uniform Commercial Code*, 62 TEMP. L. REV. 117, 147–51 (1989) (emphasizing that UCC Article 9 drafters sought to liberalize lenders' ability to secure their loans).

In addition, scarcity and perceived risks of MH financing give MH lenders particularly disproportionate power over debtors.[82] Dominant MH lending companies face little competition in setting lending practices.[83] Furthermore, some lenders have recently increased their bargaining power by tightening lending standards in the wake of rising default rates in the late 1990s.[84] Although lenders' tightened standards may help moderate MH debtors' default rates, some lenders have used this leverage to impose especially onerous contract terms.

Interest rates on MH loans typically run two to five percentage points above those for conventional mortgages.[85] MH lenders also may add "points" to loan amounts that exceed 5%, but confuse MH borrowers by failing to include points in the stated "amount financed."[86] Some lenders also add high costs of Homebuyer Protection Plans, Extended Service Warranties, and credit life insurance in loan amounts.[87] This is especially problematic when consumers purchase these plans, warranties, and insurance from MH dealers and lenders at elevated costs.[88]

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[82] *See* Mitchell, *supra* note 8, at 12 (noting serious losses suffered by lenders and describing lender's feelings that "the manufactured housing loan business is like auto lending, *but without the same checks and balances*").

[83] Issac J. Bailey, *The Problem Credit Built*, THE SUN NEWS (S.C.), Sept. 29, 2002, at A1 (discussing Conseco's purchase of Green Tree Financial, and Conseco's recent tightening of its lending, decreasing its share of MH loans from 30 to 18%).

[84] *Id.* For example, one of the largest MH lenders, Conseco, reported credit scores on its 2001 loans that were roughly the same as scores acceptable to conventional mortgage lenders. *Id.* Lenders have become especially circumscribed in financing used MHs, which make up the bulk of the MH market. *See Mortgage Lending*, *supra* note 23, at 3.

[85] *Mortgage Lending*, *supra* note 23, at 2–3; *see also Dream Home*, *supra* note 18, at 33 (reporting that a 1998 MH owner survey indicated a 10.4% average rate for bank loans, and a 12.3% average rate for dealer loans); R. Kevin Dietrich, *Proposed Manufactured Home Regulations Debated*, THE STATE (Columbia, S.C.), Feb. 24, 2002, at F4 (discussing regulations to address predatory lending practices and onerous interest rates); Mitchell, *supra* note 8, at 2 (noting Consumers Union's finding that MH loans were typically issued to consumers at interest rates of 9-13% A.P.R., or above, at a time when conventional home loans ranged from 7-8.5%). A Texas study recently found MH loans ranging from 7.75-19%, at a time when thirty-year conventional home loans were in the ranges of 7 and 8.5%. *Id.* at 13.

[86] *See* Mitchell, *supra* note 8, at 3, 13–16 (noting that, in many of the loans it reviewed, "the points alone added more than three percent to the net price" and explaining how points augment the actual interest rate).

[87] *Id.* at 21.

[88] *Id.* (noting report by the Consumer Federation of America/Center for Economic Justice).

MH consumers generally may not avoid these high interest rates and costs by arguing that they are unconscionable.[89] This is true even though these high rates and costs drive MH loans "underwater," meaning the MH debt exceeds the value of the MH that secures the debt.[90] MH debtors thus become vulnerable to foreclosure and repossession at rates that have been as high as 20% over the past seven years.[91] A reported 12% of all MH loans end up in default, which is four times the default rate for conventional mortgages.[92] In addition, MH lenders often launch dual attacks by foreclosing on the MHs as collateral, while also suing the debtors personally for the deficiencies that may remain after sale of the repossessed MHs.[93] To make matters worse, defective MHs presumably draw lower prices in resale, thereby increasing debtors' deficiency liabilities.[94]

UCC Article 9 fosters this liberal repossession of MHs. It does not require the rigorous rules that apply to real estate foreclosures.[95] Real estate law may permit debtors to redeem property at any time prior to resale by paying off the entire debt, or only the amount in arrears.[96] It also may allow debtors to redeem property *after* a foreclosure sale[97] and may protect debtors from post-foreclosure deficiency lawsuits.[98]

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[89] Mobile Am. Corp. v. Howard, 307 So. 2d 507, 507–08 (Fla. Dist. Ct. App. 1975) (holding that a MH installment sales contract requiring an annual interest rate of 11.75% was not per se unconscionable because cost alone will not render an agreement unconscionable).

[90] Mitchell, *supra* note 8, at 22–25.

[91] *See Mortgage Lending*, *supra* note 23, at 2 (stating that this rate is much higher for chattel loans than for conventional mortgages as well); Bailey, *supra* note 83, at A1 (lamenting the "rash of repossessions" in 2001 and 2002 due to loose lending practices).

[92] NRC EXAMINATION, *supra* note 1, at 13 (emphasizing how lenders have used this risk to justify a "range of permissible loan terms and tactics [that] extends beyond what would pass muster in the conventional mortgage market"). Financing options are even more limited with respect to MH refinancing, resale, or renovation, than they are with respect to new MH purchases. *Id.* at 27.

[93] *See* Bailey, *supra* note 83, at A1 (noting comparison rates for defaults).

[94] It seems, however, that a consumer would have some recourse in a warranty action for damages suffered because the consumer became liable to a lender for a deficiency caused by MH defects.

[95] *See* HILL, *supra* note 77, at 199–289 (outlining the law regarding real estate mortgage defaults).

[96] *See id.* at 209–13 (discussing judicial foreclosure); *see also* 1 GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW § 7.1, 604–05 (4th ed. 2002).

[97] NELSON & WHITMAN, *supra* note 96, at 604–05; Joan M. Cambray, *Commercial Real Estate Financing: What Borrowers and Lenders Need to Know: Default and Foreclosure*, *in* 2 PRACTISING L. INST. 307, 320–22 (Joshua Stein ed., 2002) (explaining

In contrast, a secured MH lender may privately repossess a MH, provided the secured lender does not breach the peace.[99] A lender also may swiftly foreclose on a MH using state replevin statutes, which are less protective of debtor rights than real estate foreclosure laws.[100] Assuming an acceleration clause, UCC Article 9 generally requires a debtor to pay off an entire secured debt to redeem a MH prior to its sale or other disposition, and does not provide for post-sale redemption or debt reinstatement.[101] UCC Article 9 also preserves secured parties' rights to seek deficiencies from debtors.[102]

MH lenders may augment their rights by imposing arbitration provisions in MH contracts. These provisions often allow the lender to proceed directly in court to repossess and foreclose on a MH, while the MH debtor must arbitrate any warranty claims.[103] Courts generally enforce arbitration requirements despite default on a debt and may order parties to arbitrate breach of contract claims even though the defaulting debtor has filed for bankruptcy.[104] This means defaulting consumers may lose their MHs through

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the broad redemption and reinstatement rights provided to real estate debtors under California law).

[98] *See* HILL, *supra* note 77, at 267–69 (discussing such protective measures).

[99] U.C.C. § 9-609(b) (1998); *see also* Smith, *supra* note 81, at 53–58 (describing basic default rules of UCC Article 9 as recently revised). Generally, a secured party must sell repossessed collateral in a private or public sale, apply proceeds to repayment of the debt and costs of repossession, and then return any surplus from the sale to the debtors. *Id.*

[100] *See* U.C.C. § 9-601(f); *see also* Christopher Barrier, *A Stitch in Time: Secured Lending Under Revised Article 9*, ARK. LAW., Fall 2001, at 29, 32–34 (noting pro-lender aspects of revised UCC Article 9).

[101] This assumes these loan agreements have acceleration clauses, as nearly all loans do. U.C.C. § 9-623; JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE: SECURED TRANSACTIONS § 25 (5th ed. 2000); Smith, *supra* note 81, at 56.

[102] A secured MH lender generally may sell repossessed collateral in a private or public sale, apply proceeds to repayment of the debt and repossession/resale costs, and then return any surplus from the sale to the debtors. A secured party also has the option of retaining collateral in satisfaction of a debt, unless the collateral is consumer goods in the possession of the debtor, or consumer goods for which a significant portion of its purchase price has already been paid. U.C.C. §§ 9-620, 9-608(b), 9-616. UCC Article 9's consumer provisions merely protect a consumer debtor by requiring that the lender seeking a deficiency provide the consumer with an explanation of the calculation of the deficiency claim before demanding its payment. U.C.C. § 9-616.

[103] *See infra* notes 151–53 and accompanying text (discussing unilateral carve-outs for lenders' suits).

[104] *See In re* Dunes Hotel Assocs., 194 B.R. 967, 991–94 (Bankr. D.S.C. 1995) (finding that many of the real estate claims were core claims that must be determined by

lenders' mass collection practices before the consumers have a chance to arbitrate warranty claims.[105] These realities recently led Freddie Mac to ban binding arbitration clauses in all subprime loans it purchases because these clauses defy "our nation's public policy of an open and fair path to homeownership."[106]

### 2. *Uneven Bargaining Power in MH Consumer Transactions*

#### a. *MH Insiders' Relative Power*

MH insiders generally enjoy significantly more economic and political power than do their constituent consumers.[107] This has allowed some insiders to perpetuate warranty and financing abuses.[108] By 1998, a reported ten companies manufactured almost three-fourths of all MHs.[109] MH insiders also have enhanced their power by consolidating both financially and politically.[110] Industry leaders have joined political forces through groups such as the Manufactured Housing Institute (MHI), which represents

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the bankruptcy court, but holding that breach of lease and damages due to breach could go to arbitration per the parties' contract).

[105] *See* Samuel J.M. Donnelly and Mary Ann Donnelly, *Commercial Law Is a Humanism*, 53 SYRACUSE L. REV. 277, 297–99 (2003) (discussing how abuses "grow up" around collection practices, and how mass production of consumer collection practices are perpetuated through routine default judgments in roughly 90% of collection actions).

[106] *Consumer, Civil Rights Groups Commend Freddie Mac's Leadership in Banning Mandatory Arbitration Clauses*, PR NEWSWIRE ASSOCIATION, INC., Dec. 9, 2003, *at* http://www.prnewswire.com (last visited Jan. 2, 2004); *see also Freddie Mac Bans Mandatory Arbitration*, COURIER NEWS, Dec. 19, 2003, at 7F, *available at* LEXIS, News Library, US Newspapers and Wires File (reporting ban on arbitration clauses); Gregory J. Wilcox, *Freddie Mac's Mortgage Shift Protects Consumers*, THE DAILY NEWS OF LOS ANGELES, Dec. 14, 2003, at B1, *available at* LEXIS, News Library, US Newspapers and Wires File (reporting same and noting that Freddie Mac has similar rule for prime loans).

[107] *See* NRC EXAMINATION, *supra* note 1, at 3 (discussing consolidation and integration of MH manufacturers, dealers, and lenders).

[108] *See id.*

[109] *Dream Home*, *supra* note 18, at 30; Kortney Stringer, *How Manufactured-Housing Sector Built Itself Into a Mess*, WALL ST. J., May 24, 2001, at B4 (discussing consolidation in the wake of the devastating fall of some MH companies due to easy credit and unchecked increases in manufacturing).

[110] *See Dream Home*, *supra* note 18, at 34 (noting the predominance of powerful MH park owners, including Clayton Homes, one of the largest MH manufacturers).

manufacturers, retailers, insurers, and financiers.[111] The MHI is a multimillion-dollar association that maintains a dominant voice in HUD's establishment of MH manufacturing and safety standards.[112] In addition, a relatively small pool of lenders who specialize in subprime or MH lending has maintained considerable influence over MH financing.[113]

### b. *High-Pressure Deals on Terms Favorable to Industry Insiders*

Some MH insiders use their disproportionate power to impose one-sided contract terms on MH consumers in high-pressure sales.[114] Dealers may get consumers approved for financing and prepare sales and financing contracts in a matter of hours.[115] Lenders often fail to slow the sales process to ensure consumers' capacity to repay their loans.[116] Instead, some dealers and lenders discourage loan shopping by warning consumers against getting

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[111] Robert W. Wilden, *Manufactured Housing: A Study of Power and Reform in Industrial Regulation*, 6 HOUSING POLICY DEBATE 523, 531 (1995).

[112] *Id.* at 531–36 (discussing the role of MHI in establishing national policies); *see also* NRC EXAMINATION, *supra* note 1, at 16 (noting how MHI has promoted MHs as a means of affordable housing, and touts their cost and efficiency benefits). In 1990, for example, Congress created the National Commission on Manufactured Housing (NCMH) that developed an initial plan for a five-year warranty that never came to fruition because MH retailers and manufacturers joined forces to squelch the plan. *ASCE Proposes Amendment to Manufactured Housing Bill*, *available at* http://www.asce.org/pressroom/news/grwk/grwk0310_manufacturedhousing.cfm (Mar. 10, 2000) (last visited Aug. 14, 2004) (explaining the American Society of Civil Engineers' (ASCE) proposal to quell the MH industry's influence over the creation and enforcement of federal safety standards by reforming HUD's "consensus committee" approach).

[113] *See HUD Subprime and Manufactured Home Lender List*, *available at* http://www.huduser.org/datasets/manu.html (last visited Aug. 14, 2004) (indicating only 19 MH lenders).

[114] *Dream Home*, *supra* note 18, at 33 (noting that consumers must generally make this very significant financial and housing decision based on catalog descriptions and models).

[115] *See Tips*, *supra* note 70, at 12.

[116] *See* Mitchell, *supra* note 8, at 9 (discussing lenders' focus on volume, especially when affiliated with MH manufacturers and dealers). Even independent lenders have been emphasizing sales volume, and therefore have been lending to consumers who have credit scores that suggest they would not be able to repay the loan. *Id.*; *see also Mortgage Lending*, *supra* note 23, at 3 (noting with respect to financing that it is "difficult for buyers to choose the slower path, using a more conservatively underwritten mortgage loan").

credit checks at multiple dealerships.[117] Dealers also may dissuade comparative shopping by charging fairly hefty, and sometimes nonrefundable, deposits in order to reserve a MH or begin the credit application process.[118]

MH dealers also may turn up sales pressure by promoting package sales that cover the MH, insurance, and financing. These packages can also include MH park rent, furniture, appliances, and so-called "freebies" (*e.g.*, cars, vacations, cell phones, and coupon books).[119] Some dealers, however, clandestinely add these costs to loan amounts,[120] or otherwise misrepresent total package costs.[121]

This is especially problematic when consumers hastily sign purchase agreements without reading the immediate agreements, let alone any package terms incorporated into an agreement by reference.[122] Insiders also may impose onerous warranty and financing terms on MH consumers in standard form contracts.[123] Courts enforce such boilerplate agreements, subject to general contract defenses, such as fraud, unconscionability, and lack of consideration.[124] Consumers may unknowingly agree to package costs that poise them for default by raising loan amounts well above MH values.[125]

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[117] *See* Mitchell, *supra* note 8, at 4 (discussing dealership training that includes telling consumers that shopping around will harm their credit).

[118] *Id.* at 4, 6–7. Deposits range from $100 to $500, and some dealers also charge a credit check fee of $25 or more. *Id.* at 4. Consumers Union found that 19% of the MH complaints it reviewed involved dealers who refused to return deposit money after a consumer decided not to complete the purchase. *Id.* at 1–2, 6.

[119] *Id.* at 6. These so-called gifts are offered to get consumers to close the deal, without really considering all the terms and conditions of a MH purchase. *Id.*

[120] *Id.*

[121] *Id.* at 1–3. In the Consumers Union's review of over 400 complaints filed with the Attorney General and the Office of Consumer Credit Commissioner (OCCC), It found that the principal complaints focused on "too-good-to-be-true offers." *Id.* at 1. The laundry list of alleged dealer misrepresentations included complaints that the dealer switched the house, tried to falsify loan application information, increased the price of the MH, included additional fees and costs not disclosed at the start, or asked consumers to sign blank documents. *Id.*

[122] *Tips*, *supra* note 70, at 11.

[123] *See Paper Tiger*, *supra* note 65, at 7 (discussing boilerplate agreements used throughout the MH industry by insider retailers, manufacturers and lenders).

[124] John J.A. Burke, *Contract as Commodity: A Nonfiction Approach*, 24 SETON HALL LEGIS. J. 285, 307–10 (2000) (critiquing the current regulation of standard form contracts, and proposing that the law account for the reality that a form contract is "a series of terms embedded by a seller in products marketed for mass distribution and consumption"); *see also* Southern Energy Homes, Inc. v. Nalley, 777 So. 2d 99, 102–03

### c. *Absence of Education or Counsel Regarding MH Transactions*

The classes, counselors, and educational programs available to assist those considering purchasing conventional site-built homes are usually not available for MH consumers.[126] This lack of MH buyer education and counseling resources is particularly problematic for first-time homebuyers and low-income consumers likely to purchase MHs.[127] MH purchasers also typically do not enjoy the Truth in Lending Act (TILA) three-day cooling-off period during which conventional homebuyers can cancel a real estate loan.[128]

It seems that lenders should fill this education gap in order to protect their investments in consumer MH purchases. Studies indicate, however, that most lenders do not provide important information to MH consumers about their rights.[129] One prominent MH lender was subject to a $27 million judgment for its failure to inform consumers regarding their rights to choose

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(Ala. 2000) (compelling arbitration of MH warranty claims and holding that the Magnuson Moss Warranty Federal Trade Commission Improvement Act (MMWA) does not bar the enforcement of an arbitration clause in a written warranty) Mobile Am. Corp. v. Howard, 307 So. 2d 507, 507–08 (Fla. Dist. Ct. App. 1975) (per curiam) (reversing a trial court finding that a MH installment sales contract requiring an 11.75% interest rate was "so unconscionable as to shock this court's conscience," thereby allowing for the contract's enforcement on remand). *But see* First Nat'l Bank of Md. v. DiDomenico, 487 A.2d 646, 648–50 (Md. 1985) (finding that a lender's misstatement of a MH debtor's rights in the notice of repossession and resale of the MH as collateral for the loan violated the UCC, and therefore the lender could not seek a deficiency judgment where proceeds of the MH sale did not cover the outstanding debt).

[125] *See Tips*, *supra* note 70, at 9 (noting that this is especially true with property insurance in that it would be cheaper if purchased directly from an insurance company); s*ee also MH Appreciation*, *supra* note 18, at 3–4 (explaining how onerous financing and added costs cause loans to be underwater).

[126] *See Raising the Floor*, *supra* note 18, at 1 (advocating that homeownership classes should provide information regarding MH purchasing); NRC EXAMINATION, *supra* note 1, at 18–19, 21, 24–25 (noting lack of MH buyer education).

[127] *See* NRC EXAMINATION, *supra* note 1, at 19 (noting how it is "incongruous" that those most in need of homebuyer education do not have access to such information regarding MH purchasing).

[128] *Id.* at 18 (noting how the TILA three-day period during which real estate debtors can terminate a home loan does not apply for personal property loans).

[129] *See id.* at 18–19 (lamenting the "enormous need for homebuyer education and counseling").

their own brokers or attorneys.[130] Some consumer groups also argue that the lack of education and counseling makes MH consumers particularly vulnerable to pro-industry promotional materials.[131]

## III. CREATION OF THE ARBITRAL REGIME THREATENING CONSUMERS' MH WARRANTY CLAIMS

Binding arbitration clauses in MH contracts augment burdens of MH living. MH consumers' challenges to these clauses have even hit the Supreme Court.[132] This is not surprising, because MH insiders routinely include binding arbitration provisions in their form sales and financing contracts.[133] Furthermore, consumers almost never have the opportunity to negotiate these provisions, even though they may severely curtail consumers' remedial and procedural rights.[134] Most courts nonetheless enforce these arbitration clauses pursuant to the Supreme Court's pro-arbitration application of the FAA.[135] Arbitration, therefore, has become a norm for MH

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[130] Bailey, *supra* note 83, at A1. Lenders such as Green Tree Financial Corp. have also been reported to use "gain on sale" accounting, which allowed them "to approve as many mortgages as possible, regardless of the ability of client to repay, knowing the loans would still show up as profit." *Id.* It was reported that this drove up Green Tree's stock and provided its CEO with $200 million in salary. *Id.* Still, some lenders have met to develop standard practices aimed to improve quality control and consumer protection. *Id.*

[131] *See* NRC EXAMINATION, *supra* note 1, at 18–19 (noting the need for homebuyer education).

[132] Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 446–47, 450–52 (2003); Green Tree Fin. Corp. v. Randolph, 531 U.S. 79, 91 (2000) (addressing the costs of arbitration of TILA claims under a mobile home financing agreement).

[133] *See* Melissa Briggs Hutchens, *At What Costs?: When Consumers Cannot Afford the Costs of Arbitration in Alabama*, 53 ALA. L. REV. 599, 600 (2002) ("It is almost impossible to purchase a new car or mobile home or to get a small loan without being subject to a form contract containing an arbitration provision.").

[134] *See* Terry Carter, *Arbitration Pendulum: Mandatory Arbitration Agreements, Once an Easy Pass, Come Under More Scrutiny*, A.B.A. J., May 2003, at 14 (discussing abuse by some companies that impose arbitration clauses in consumer contracts). *See generally* David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33 (1997) (questioning arbitration of employee and consumer claims pursuant to form agreements).

[135] *See* Federal Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended in scattered sections of 9 U.S.C. (2000)); UNIF. ARBITRATION ACT, 7 U.L.A. 1 (1997). Discussion regarding enforcement under the FAA equally implicates enforcement under the UAA because the UAA mimics the FAA. *See also Randolph*, 531 U.S. at 84–

consumer claims. This, in turn, has allowed MH insiders to create an effectual private lawmaking regime.[136]

## A. *Insider-Imposed Arbitration Provisions*

"Virtually all manufactured homes are sold with arbitration agreements."[137] Indeed, arbitration clauses are more prevalent in MH contracts than in conventional home contracts.[138] These arbitration clauses preclude consumers' access to a jury and the judicial process by requiring them to submit disputes to a private arbitrator who renders a binding decision subject to very limited judicial review.[139] Under the FAA, courts must enforce these clauses by compelling arbitration and/or staying litigation unless the clause is unenforceable under general contract law.[140] Many courts eagerly uphold these clauses due to what many have seen as the Supreme

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90 (finding MH consumer failed to meet burden of proving prohibitive arbitration costs and therefore enforced arbitration provision in financing contract); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 268 (1995) (enforcing arbitration clause in consumer "Termite Protection Plan").

[136] *See* David V. Snyder, *Private Lawmaking*, 64 OHIO ST. L.J. 371, 375–77, 402–03, 410–12, 448–49 (2003) (explaining private law and private lawmaking, and proposing that it should be subject to scrutiny due to the significant amount of private lawmaking that predicts how courts will act in commercial disputes).

[137] *Paper Tiger*, *supra* note 65, at 7; *see also* Carter, *supra* note 134, at 14 (emphasizing the prevalence of arbitration clauses in consumer contracts in Alabama, especially in response to large consumer verdicts in the 1990s).

[138] *Tips*, *supra* note 70, at 9 (noting that the Texas state association of MH retailers distributes a standard form contract that contains an arbitration clause).

[139] Federal Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (codified as amended in scattered sections of 9 U.S.C.); Burke, *supra* note 124, at 285, 315–16 (discussing the strict enforcement of arbitration agreements in form contracts, and their preclusion of judicial access). Arbitrators' awards are subject to very limited review under the FAA and UAA. 9 U.S.C. § 10 (2000); UNIF. ARBITRATION ACT § 12; REVISED UNIF. ARBITRATION ACT § 23(a)(1–6).

[140] If a valid arbitration agreement exists the court must order the parties to arbitrate and any issues going to the validity of the underlying contract are for the arbitrators to decide. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 402–04 (1967) (announcing the "separability doctrine," which deems the arbitration clause separable from the main contract, thereby requiring that a court compel arbitration of underlying issues once it determines there is an arbitration agreement). Furthermore, if the parties do not empanel an arbitrator, the court will do so to get arbitration underway. 9 U.S.C. § 5; *see also* Burke, *supra* note 124, at 315–16 ("Strangely, the arbitration clause is the term least likely to be judicially invalidated," due to policy favoring enforcement.).

Court's federalization of its pro-enforcement agenda.[141] Some criticize this agenda, however, and question arbitration's fairness in uneven bargaining contexts.[142]

Arbitration may be beneficial in the MH sales and financing context. It seems courts should enforce consumers' consensual agreements to arbitrate where arbitration procedures are fair and result in cost savings that insiders ultimately pass on to consumers.[143] The problem is that MH insiders with disproportionate bargaining power over consumers often contractually

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[141] *See* Julia A. Scarpino, *Mandatory Arbitration of Consumer Disputes: A Proposal to Ease the Financial Burden on Low-Income Consumers*, 10 AM. U. J. GENDER SOC. POL'Y & L. 679, 683–91 (critiquing the Supreme Court's "pro-arbitration stance" in consumer disputes); Hutchens, *supra* note 133, at 600–05 (discussing the Supreme Court's application of the FAA's preemptive force to enforce arbitration in consumer contracts).

[142] *See, e.g.*, Stempel, *supra* note 11, at 264–71 (noting the potential benefits of arbitration); Ware, *supra* note 11, at 708–09 (describing flexibility and private choice in arbitration). *But see generally* Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996) (critiquing companies' inclusion of arbitration clauses in their contracts with consumers, employees, and other "little guys"); *see also Paper Tiger*, *supra* note 70, at 7, 21–22, 29 (discussing MH retailers' and lenders' imposition of arbitration on consumers); Thomas J. Stipanowich, *Resolving Consumer Disputes: Due Process Protocol Protects Consumer Rights*, DISP. RESOL. J., Aug. 1998, at 8, 9–11 (noting "'privatization' of adjudication in consumer contracts" through the vast expansion of arbitration in the wake of "favorable Supreme Court decisions affirming the broad reach of federal arbitration law"); Consumers Union, *The Arbitration Trap: How Consumers Pay for 'Low Cost' Justice*, CONSUMER REP. (Aug. 1999), *available at* http://www.consumerreports.org/main/detail.jsp?CONTENT%3C%3Ecnt_id=19279&FOLDER%3C%3Efolder_id=18151 [hereinafter *Arbitration Trap*] (noting that arbitration has the potential to alleviate delays of litigation, but lamenting unfairness of procedures and costs imposed on MH consumers).

[143] *See* Andrew P. Lamis, *The New Age of Artificial Legal Reasoning as Reflected in the Judicial Treatment of the Magnuson-Moss Act and the Federal Arbitration Act*, 15 LOY. CONSUMER L. REV. 173, 246–47 (2003) (promoting fair and voluntary alternative redress mechanisms for the resolution of consumer claims); *see also* Stephen J. Ware, *Consumer Arbitration as Exceptional Consumer Law (With a Contractualist Reply to Carrington & Haagen)*, 29 MCGEORGE L. REV. 195, 211–13 (1998) (discussing the cost savings of arbitration in consumer transactions). The question is whether insiders share these savings with consumers or hoard them. *See* Sternlight, *supra* note 142, at 686–93 (critiquing free market justifications for arbitration of consumer claims, and concluding that, "given the high cost of information and consumers' behavior with respect to risk, it appears that failing to regulate the market with respect to arbitration clauses is likely to lead to an inefficient result that benefits those who impose form arbitration agreements").

mandate particularly pro-industry arbitration terms and procedures.[144] Effects of onerous arbitration procedures, combined with the economic, social, and political complexities of MH transactions, threaten the potential that MHs provide for low-income consumers to own their homes. One-sided arbitration requirements may leave MH consumers with severely limited means for policing the safety of their homes. These requirements may prevent MH consumers from vindicating their warranty rights prior to losing their homes in foreclosure.[145]

Typical arbitration clauses in MH sales and financing contracts broadly require that consumers arbitrate any and all MH claims, including contract, warranty, tort, and statutory claims.[146] These broad clauses also may inure to the benefit of third parties and assignees of the agreement, such as manufacturers and lenders.[147] In addition, MH insiders often impose arbitration provisions that hit consumers from every angle by including a full arsenal of anti-consumer provisions.[148] These provisions often allow insiders to select the arbitrator and seek judicial relief for nonpayment and

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[144] Scarpino, *supra* note 141, at 685–91 (discussing the onerous costs and procedures of consumer arbitration provisions).

[145] *See supra* Part II (discussing the confluence of unique factors affecting MH transactions).

[146] *See, e.g.*, Cunningham v. Fleetwood Homes of Georgia, Inc., 253 F.3d 611, 613 n.1 (11th Cir. 2001) (quoting a broad arbitration clause in a MH sales contract, covering all claims "arising out of or in any way relating" to sale of MH and negotiations leading to sale, including contract, warranty, and tort, and expressly inuring to the benefit of third-party manufacturers, etc.).

[147] *See id.*; *see also* Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 30 CAP. U. L. REV. 583, 610–13 (2002) (discussing the "frequent fact pattern" in Alabama cases in which MH consumers are bound to arbitrate claims against third parties by an arbitration agreement under third-party beneficiary rules; further finding that the issue of whether a consumer was bound to arbitrate with a non-signatory defendant split the Alabama Supreme Court 11 times between January 18, 1995, and July 9, 1999, and that "business-funded justices" cast 67% of their votes in these cases to require arbitration, while "plaintiffs'-lawyer-funded justices" cast zero votes for a broad interpretation).

[148] *See* Sternlight, *supra* note 142, at 686–93 (proposing that consumers are unlikely to find, let alone fully comprehend and negotiate, arbitration provisions in form contracts); Mark E. Budnitz, *Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection*, 10 OHIO ST. J. ON DISP. RESOL. 267, 320–22 (1995) (opining that any "option" consumers may have for taking their business to lenders who do not require arbitration is illusory in that consumers are unlikely to be fully informed about pros and cons of arbitration, and they may not have alternatives due to increasing prevalence of arbitration clauses and limited borrowing opportunities for rural and low-income consumers).

foreclosure, while consumers must arbitrate any tort, warranty, and contract claims.

In addition, standard clauses often do not provide for neutral administration by the American Arbitration Association (AAA) or another organization that may require application of consumer protection procedures. For example, the typical arbitration clause in Conseco's (formerly Green Tree Financial Corp.) MH sale and financing form contract provides that all disputes of any kind must be determined by one arbitrator "selected by [Conseco] with [the MH consumer's] consent."[149] It also reserves to Conseco the "option to use judicial (filing a lawsuit) or non-judicial relief to enforce a security agreement relating to the [MH] secured in a transaction underlying this arbitration agreement, to enforce the monetary obligation secured by the [MH] or to foreclose on the [MH]." The clause further states that Conseco's exercise of that option does not waive its right to enforce a consumer's duty to arbitrate.[150] This means a consumer may not assert warranty and other claims as counterclaims to any judicial foreclosure action Conseco asserts against the consumer.

These unilateral carve-outs for collection and foreclosure actions allow lenders to quickly repossess MHs and collect on delinquent loans.[151] This may seem fair in light of the high risks of MH loans. These carve-outs favor insiders, however, even when they allow either party to seek ancillary relief, because consumers rarely, if ever, use them.[152] Generally, consumers' chief claims are warranty, contract, or statutory claims, which the arbitration provisions cover. Furthermore, these carve-outs impact consumers' warranty rights by stripping any leverage a consumer may have for coaxing insiders to remedy defects. MH consumers often try to obtain repairs by withholding payment on a MH loan or purchase until a responsible party cures the defects. Carve-outs, however, allow insiders to repossess the MH from a

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[149] *See* Crayton v. Conseco Fin. Corp., 237 F. Supp. 2d, 1322, 1324 (M.D. Ala. 2002) (quoting Conseco's form agreement).

[150] *Id.* at 1329 n.5.

[151] *See, e.g., In re* Firstmerit Bank, N.A., 52 S.W.3d 749, 753–57 (Tex. 2001) (enforcing an arbitration agreement with a carve-out provision allowing bank to assert collection and foreclosure claims directly in court); *see also* Crayton v. Conseco Fin. Corp., 237 F. Supp. 2d 1322, 1323–24 (M.D. Ala. 2002) (enforcing arbitration clause with same carve-out provision).

[152] *See* Budnitz, *supra* note 148, at 274 (discussing carve-out provisions in consumer loan contracts).

consumer seeking this strategy before the consumer may get a chance to arbitrate warranty claims.[153]

These arbitration provisions also may require that consumers share the costs of arbitration. This may burden consumers with typically high filing, administration, and arbitrator fees, and preclude their rights to collect attorneys' fees under applicable statutes. [154] Arbitration filing costs often exceed $1,000, and parties may have to advance their share of the arbitrator's fees, which can range up to $1,600 per day for one arbitrator.[155]

Consumers often challenge these cost-sharing provisions because they stymie consumers' vindication of warranty and other statutory rights. These

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[153] *See, e.g., In re Firstmerit Bank, N.A.*, 52 S.W.3d at 753–56 (ordering consumers to arbitrate warranty and credit claims, even though the bank had already repossessed their MH pursuant to the carve-out provision); *see also* Tammac Corp. v. Norch, No. 2002CA00402, 2003 WL 21224229, at *2–4 (Ohio Ct. App. May 27, 2003) (denying class relief to mortgagors in foreclosure action, and emphasizing concern that mortgagors will counterclaim for class relief to avoid quick foreclosure).

[154] *See* Scarpino, *supra* note 141, at 688–90 (discussing the high costs and fees associated with arbitration); Green Tree Fin. Corp. v. Randolph, 531 U.S. 79, 82–90 (2000) (addressing, but providing little guidance, about how to proceed when arbitration costs are so high that they preclude a consumer from vindicating statutory rights).

[155] *See* AMERICAN ARBITRATION ASSOCIATION, COMMERCIAL ARBITRATION RULES, R-49–R-52 (2003), *at* http://www.adr.org/RulesProcedures (last visited Oct. 18, 2004) (requiring that parties making claims or counterclaims must advance filing fees subject to final apportionment by the arbitrator, that parties bear other arbitration expenses and arbitrators' fees, and that parties may have to deposit sums necessary to cover costs in advance of hearings); *see also id.* at O-8 (listing filing and case service fees according to amount of claim as follows: $0–$10,000 = $700; $10,001–$75,000 = $1,050; $75,001–$150,000 = $2,250; $150,001–$300,000 = $4,000; etc., up to fees of $14,000 for $5,000,000–$10,000,000 claims); Scarpino, *supra* note 141, at 688–91 (contrasting $750 arbitration filing fee for smaller claims with $150 fee for filing a complaint in federal court). Parties to arbitration are also responsible for arbitrators' fees, rental room costs, transcriber fees and costs, etc., all of which add up to thousands of dollars. *Id.* Nonetheless, the AAA and others have suggested summary and expedited procedures for consumer disputes that should apply when the AAA is used to administer arbitrations pursuant to businesses' "standardized, systematic application of arbitration clauses with customers and where the terms and conditions of the purchase of standardized, consumable goods or services are non-negotiable or primarily non-negotiable in most or all of its terms, conditions, features, or choices" where the products or services are for personal or household use. AMERICAN ARBITRATION ASSOCIATION, SUPPLEMENTARY PROCEDURES FOR THE RESOLUTION OF CONSUMER-RELATED DISPUTES (2003), *at* http://www.adr.org/RulesProcedures (last visited Oct. 18, 2004) [hereinafter AAA CONSUMER RULES]. When these consumer procedures apply, the AAA specifies administrative and arbitrator fees that vary depending on the amount of claims and extent of any hearings, and cap fees consumers must pay. *Id.*

challenges remain viable in the wake of the Supreme Court's failure to articulate standards for these provisions in *Green Tree Financial Corp. v. Randolph.*[156] The Court in *Randolph* indicated that parties may be able to avoid arbitration based on a sufficient showing that they would bear prohibitively high arbitration costs.[157] The Court did not explain, however, what showing would be sufficient.[158] Instead, it upheld the MH arbitration agreement at issue because it was ambiguous regarding the consumers' responsibility for allegedly high costs.[159]

In reality, it is often difficult for MH consumers to bear arbitration costs.[160] This is especially true when these consumers have fairly small claims, but may not assert them in a class action due to arbitration provisions.[161] Arbitration provisions prevent claimants from joining judicial class actions, and most courts refuse to order class-wide arbitration unless the parties' contracts clearly allow it.[162] Many courts also refuse to consolidate related arbitrations where separate arbitration agreements do not expressly provide for consolidation.[163]

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[156] *Randolph*, 531 U.S. at 82–90.

[157] *Id.*

[158] *Id.*

[159] The Court found that, although Randolph had provided information regarding high AAA arbitration fees and costs, she had not presented a sufficient record indicating that she would bear those costs and that they would preclude her from vindicating her contract and statutory rights. *Id.* at 91 (stating that the contract's silence regarding costs was "plainly insufficient to render it unenforceable").

[160] *See, e.g., id.* at 83 (noting that the district court (991 F. Supp. 1410 (M.D. Ala. 1997)) had denied Randolph's request for class certification, although her TILA claim involved many credit consumers with similar low-dollar claims, and therefore it seemed economically infeasible for individuals to each launch separate claims); *see also* Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 5–21 (2000) (discussing how consumers' inability to assert class actions due to arbitration provisions often prevents consumers from asserting their claims).

[161] *See* Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 217–24 (1985) (holding that the court lacks discretion to try arbitrable and nonarbitral claims in one lawsuit because the court must order arbitration of arbitrable claims under the FAA).

[162] *See, e.g.*, Iowa Grain Co. v. Brown, 171 F.3d 504, 510 (7th Cir. 1999) (refusing to order class arbitration); Champ v. Siegel Trading Co., 55 F.3d 269, 274–77 (7th Cir. 1995) (same); Gammaro v. Thorp Consumer Disc. Co., 828 F. Supp. 673, 674 (D. Minn. 1993) (same).

[163] *See, e.g.*, Gov't of the United Kingdom v. Boeing Co., 998 F.2d 68, 74 (2d Cir. 1993); Del E. Webb. Constr. v. Richardson Hosp. Auth., 823 F.2d 145, 150 (5th Cir.

The propriety of ordering class-wide arbitration remains uncertain. The Supreme Court, in *Green Tree Financial Corp. v. Bazzle*, declined to answer whether the FAA permits class-wide arbitration when the arbitration agreement is silent on the issue.[164] Instead, the Court, in a 5-4 decision, vacated a South Carolina court's order for class relief on the grounds that it was for the arbitrator, and not the court, to determine whether the arbitration clause at issue prohibited class-wide arbitration.[165]

*Green Tree Financial Corp. v. Bazzle* is particularly poignant for MH claimants. It involved class arbitrations in two companion cases against Green Tree Financial Corporation (*Bazzle* and *Lackey*) regarding its failure to provide notice to MH and subprime borrowers concerning their rights to choose their own attorneys and insurance agents.[166] In the *Bazzle* case, an arbitrator awarded a class of 1,899 consumers $10,935,000 in damages, and an additional $3,645,500 in attorney's fees and $18,242 in costs.[167] These class members may have foregone asserting their claims, however, if forced to do so in individual arbitrations, because each member obtained an average award of only $5,760.[168] Similarly, in *Lackey*, individual MH consumers

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1987); Baesler v. Cont'l Grain Co., 900 F.2d 1193, 1195 (8th Cir. 1990) (all refusing to order consolidated arbitration).

[164] Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 447 (2003).

[165] *Id.* at 447–58. The decision was 5-4 and there was no majority opinion. *Id. See also* PacifiCare Health Sys. Inc. v. Book, 538 U.S. 401 (2003) (holding in an 8-0 ruling that it was for arbitrators, and not the court, to determine whether arbitration agreements in health care contracts barred treble damages for RICO claims by prohibiting "punitive" damages); Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002) (holding that an arbitrator, and not a court, must determine whether a securities dispute is barred by the six-year time limit in the NASD's arbitration procedures). These cues from the Court have prompted lower courts to similarly avoid questions regarding what arbitration procedures are required under parties' contracts. *See* Pedcor Mgmt. Co., Inc. v. Nations Personnel of Texas, Inc., 343 F.3d 355 (5th Cir. 2003) (holding that the arbitrator must determine whether an agreement permits class arbitration).

[166] *Bazzle*, 539 U.S. at 447–49 (noting that both proceedings involved consumers' class arbitrations against Green Tree Financial Corp. arising out of lending agreements that contained identical arbitration provisions); *see also* Bazzle v. Green Tree Fin. Corp., 569 S.E.2d 349 (S.C. 2002) (explaining claims involved in the case).

[167] *Green Tree Fin. Corp.*, 569 S.E.2d at 352–53 (indicating claims under S.C. Code Ann. § 37-10-105 (Supp. 1996 & 1997) and noting $10,935,000 award for 1,899 claimants, thereby indicating an average $5,760 per class member).

[168] *Id.* Economic rationale indicates that consumers are likely to assert their claims if their expected award in an arbitration exceeds their dispute resolution costs, and are likely to forebear if their forbearance costs are less than their marginal expected liability. *See also* Christopher R. Drahozal & Keith N. Hylton, *Economics of Litigation and Arbitration: An Application to Franchise Contracts*, 32 J. OF LEGAL STUDIES 549, 552

asserted fairly small dollar claims, but the arbitrator awarded the class $9.2 million in statutory damages, as well as attorneys' fees.[169] Nonetheless, the Supreme Court sent the cases back to the arbitrators to determine whether the arbitration provisions allowed class-wide arbitration.[170] If the provisions did not allow class relief, then the awards were voided, and the consumers had the burden to reassert their claims in individual arbitrations.

Form arbitration provisions in MH contracts also are problematic because insiders often bury the provisions in take-it-or-leave-it deals.[171] Indeed, MH consumers in the midst of a high pressure MH purchase are

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(2003). Under this analysis, it seems that consumers are unlikely to bear high arbitration costs to assert low dollar claims on an individual basis, but would be more likely to assert their claims if they are able to share dispute resolution costs through class relief.

[169] The South Carolina Court of Appeals had determined that the arbitration agreement was contained in a contract of adhesion, but it was not unconscionable, despite its seemingly anti-consumer terms. Lackey v. Green Tree Fin. Corp., 330 S.C. 388, 394–402 (S.C. Ct. App. 1998); *see also Bazzle*, 539 U.S. at 459. Chief Justice Rehnquist, joined by Justices O'Connor and Kennedy, dissented on the grounds that a court must determine if a contract allows for class arbitration, and that the contracts at issue barred class-wide arbitration by stating that each Green Tree customer must agree to "a particular arbitrator for disputes between [Green Tree] and that specific buyer." *Id.* at 455–59. Justice Thomas dissented to reiterate his view that the FAA does not apply in state court proceedings, and therefore should have no impact on the South Carolina court's judgment. *Id.* at 460.

[170] *Id.* at 453–55 (vacating the South Carolina court's determination that the contract allowed for class arbitration). The arbitrator's award, including its determination of whether the contract allows for class arbitration, will be subject to FAA § 10 limited review. 9 U.S.C. § 10 (2003).

[171] "Take-it-or-leave-it" arbitration provisions included in form agreements raise important concerns regarding the consensual nature of arbitration. *See* Sternlight, *supra* note 142, at 686–93 (arguing that suppliers generally are free to impose arbitration clauses that take advantage of consumers because consumers are unlikely to be informed about the existence or meaning of arbitration provisions); *see generally* IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION 68–71 (1992) (discussing concerns regarding one-sided arbitration agreements at common law); Sarah Rudolph Cole, *Uniform Arbitration: "One Size Fits All" Does Not Fit*, 16 OHIO ST. J. ON DISP. RESOL. 759 (2001) (proposing that employees likely do not expend limited resources reading, understanding or negotiating arbitration clauses); Geraldine Szott Moohr, *Opting In or Opting Out: The New Legal Process or Arbitration*, 77 WASH. U. L.Q. 1087 (1999) (discussing the unfairness of arbitration in traditionally non-merchant contexts). *But see* Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 89–93 (2001) (emphasizing cost savings and other arguably pro-consumer aspects of arbitration that are often overlooked).

unlikely to notice, let alone challenge, an arbitration clause.[172] Furthermore, mass-production of pro-insider provisions seems to standardize fundamental inequities in MH transactions.[173] This, in turn, influences what policymakers and courts accept as valid contractual practices.[174] Mass acceptance of insider-friendly arbitration provisions in MH contracts also provides MH insiders with arguable "repeat-player" advantages, deemed to flow from arbitrators' incentives to render pro-insider awards in the hopes of earning future business.[175] As pro-insider provisions become standard, MH consumers may risk losing their warranty rights, along with their homes.

### B. *Insiders' Creation of Private Law Through Arbitration*

MH insiders' standardization of arbitration rules produces private law within western liberalism's conceptualization of the public/private legal divide.[176] This is because arbitration allows insiders to privately govern their relations and transactions.[177] Legislatures and other governmental bodies

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[172] *See* Cole, *supra* note 2, at 481 (noting how employees do not expend limited bargaining resources challenging arbitration provisions).

[173] *See* Mark C. Suchman, *The Contract as Social Artifact*, 37 LAW & SOC'Y REV. 91, 97–101 (2003) (exploring contracts as artifacts that provide insight regarding contract regimes created within multi-actor economic communities, and noting how standard-form contracts mimic mass production of conventional artifacts in industrialized societies).

[174] *Id.* at 92–95. Professor Suchman proposes the sociological study of contracts, which are capable of affecting economic and cultural environments. *Id.* at 91–93. He explains that "a consideration of contracts as artifacts links the sociology of contract both to the sociology of technological systems and to the sociology of cultural discourses." *Id.* at 93.

[175] *See* Schwartz, *supra* note 134, at 60–61 (discussing a study indicating that corporate defendants enjoy repeat-player advantages in arbitration because arbitrators have economic incentive to build "track records" that "corporate repeat-users will view approvingly," thereby sparking referrals and future arbitration business); Cole, *supra* note 2, at 453 (discussing repeat-player advantages); Budnitz, *supra* note 148, at 321–22 (noting in consumer lending context that lenders are "repeat players" that are unlikely to suffer due to occasional arbitrator error, unlike a "one-shot" player/consumer for whom the results of an erroneous award "may be very grave").

[176] Amr A. Shalakany, *Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neoliberalism*, 41 HARV. INT'L L.J. 419, 452–54 (2000) (discussing the law as divided into two spheres: public law and private law); *see also* Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1204 (2003) (noting how standard form contracting allows the drafting party "to create its own private law").

[177] *See* Shalakany, *supra* note 176, at 452–54 (explaining the distinction between public and private law).

engage civic processes to create public law that regulates the conduct of society as a whole.[178] The state controls public lawmaking to ensure the promotion of societal interests. Individuals control their private agreements to foster their own needs and goals.[179] It follows that constitutional due process applies to legislative and judicial procedures, but not to arbitration procedures.[180] Through arbitration agreements, parties can craft private legal regimes as they please, bound only by contract defenses and scant public limits.

Contractual liberty generally supports this treatment of private rulemaking. Complex concerns arise, however, when "private groups are exercising important segments of lawmaking power, affecting millions who are not group members."[181] Industry groups do this when they privately legislate by promulgating uniform standards and mass-produced contract terms.[182] The MHI, for example, has garnered significant control over MH quality by establishing its own standards and feeding them to HUD.[183] In addition, MH insiders effectively legislate transactional rules by imposing contract terms on consumers whose consent to such terms is generally illusory.[184] This allows MH insiders to impose housing rules that harm not

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[178] *See id.*; *see also* Dinesh D. Banani, *International Arbitration and Project Finance in Developing Countries: Blurring the Public/Private Distinction*, 26 B.C. INT'L & COMP. L. REV. 355, 368 (2003) (noting distinctions between public and private law).

[179] *See* Banani, *supra* note 178, at 368 (discussing the consensual nature of private lawmaking, as opposed to civic core of public law).

[180] *See* Smith v. Am. Arbitration Ass'n, Inc., 233 F.3d 502, 507 (7th Cir. 2000) (holding that commercial arbitration is not state action to which constitutional due process applies); Cremin v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 957 F. Supp. 1460, 1465–66 (1997) (same). *But see* Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577, 621–25 (1997) (proposing arbitration constitutes state action when it is judicially enforced).

[181] *See* Snyder, *supra* note 136, at 375–77. Professor Snyder explains how private law, or rules governing relations among people, is distinguishable from privately-made law, in that the latter affects masses of people and predicts how courts will act. *Id.* at 375–77.

[182] *Id.*

[183] *See supra* notes 111–13 and accompanying text (discussing MHI and the dominance of powerful insiders in the MH industry).

[184] *See* Celeste M. Hammond, *The (Pre) (As)summed "Consent" of Commercial Binding Arbitration Contracts: An Empirical Study of Attitudes and Expectations of Transactional Lawyers*, 36 J. MARSHALL L. REV. 589, 604–09 (2003) (discussing the "'myth' of voluntariness" of pre-dispute arbitration agreements in employment and consumer contracts); *see also supra* Part II.B.2 (discussing how MH insiders impose terms on consumers with little bargaining power).

only MH consumers, but also public policies promoting safe and affordable housing.[185] It accordingly seems that public regulation of this power in the low-income housing market may be appropriate.[186]

This is particularly true when MH insiders intensify their power and bypass nearly all public scrutiny through their arbitration programs.[187] Although arbitration may promote cooperation among those that share communal rules and norms, that often is untrue for MH consumers who lack the information and bargaining power of insiders. In addition, MH insiders may use arbitration to keep warranty and other contractual breaches private, and to curtail statutory and other remedies available to consumers.[188] MH insiders also are likely to choose arbitrators sympathetic to warranty defendants, and to enjoy repeat-player advantages.[189]

Again, not all MH arbitration provisions are unfair. Optimally, arbitration would foster efficiencies that would result in lower MH prices and interest rates, but would not jeopardize MH quality and warranty rights. In this way, private lawmaking through arbitration can be beneficial to both insiders and consumers.[190] Indeed, paternalistic preclusion of MH arbitration may not be wise.[191] However, it seems that some public regulation of MH

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[185] *See* Hammond, *supra* note 184, at 604–09; *see also* Part II.A.1 (discussing the low-income housing potential of MHs).

[186] *See* Snyder, *supra* note 136, at 448–49 (explaining how a significant amount of law is privately made, and therefore it should be subject to the scrutiny applied to other law).

[187] Contracting communities have used arbitration as an effective tool in cultivating private law that efficiently regulates their intra-relations. For example, cotton merchants have relied on tribunals' application of private rules and norms to promote cooperation and commercial stability and efficiency. Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1724–45, 1755–56 (2001) (discussing the cotton merchant community's creation of a private legal system (PLS) through which the community has succeeded in minimizing transaction, legal system, and collection costs); *see also* Snyder, *supra* note 136, at 402–03 (discussing Professor Bernstein's findings regarding the diamond industry's self-regulation through arbitration).

[188] *See supra* Part III.A (discussing onerous and one-sided arbitration provisions); *see also* Crayton v. Conseco Fin. Corp., 237 F. Supp. 2d 1322, 1323–24 (M.D. Ala. 2002) (quoting a typical MH arbitration provision, which preserves the lender's power to select the arbitrator with the consumer's consent).

[189] *See, e.g.*, Sternlight, *supra* note 142 (citing commentary regarding repeat-player advantages of arbitration in consumer, employment, and other "little guy" contexts).

[190] *See infra* Part IV (discussing efficiency benefits of arbitration).

[191] *See* Blake D. Morant, *The Quest for Bargains in an Age of Contractual Formalism: Strategic Initiatives for Small Businesses*, 7 J. SMALL & EMERGING BUS. L.

insiders' private lawmaking may be appropriate to protect consumers with respect to a basic need—safe and adequate shelter.[192]

## IV. UNCERTAIN AND INEFFICIENT CHALLENGES OF MH ARBITRATION PROVISIONS

Regardless of fairness issues, efficiency concerns also justify clarification of permissible arbitration procedures. MH consumers' continual and uncertain challenges of arbitration clauses sap efficiency benefits of arbitration programs. Consumers generally base these challenges on grounds that arbitration clauses violate the Magnuson-Moss Warranty Federal Trade Commission Improvement Act (MMWA), or are unenforceable under contract defenses including unconscionability, lack of consideration, and fraud.[193] Such challenges have had mixed success, which has dwindled as the Supreme Court strengthens its pro-enforcement mantra.[194] Meanwhile, consumers generally cannot cling to state regulation of arbitration agreements, because the Court has held that the FAA applies to all contracts affecting interstate commerce. This means the FAA applies in both state and federal court, and preempts state law that treats arbitration agreements

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233, 261–67 (2003) (warning of paternalistic intervention that perpetuates arrogant assumptions regarding parties' ability to determine their contracting needs and inefficiencies caused by such intervention, but proposing that intervention is necessary when bargaining inequities result in opportunistic adhesion contracts).

[192] *See supra* Part II.A and accompanying text (discussing the importance of MHs in the affordable housing market).

[193] *See, e.g.*, Walton v. Rose Mobile Homes LLC, 298 F.3d 470 (5th Cir. 2002) (MH consumers challenging arbitration under MMWA); Johnnie's Homes, Inc. v. Holt, 790 So. 2d 956, 963–64 (Ala. 2001) (MH consumers challenging arbitration on unconscionability grounds). Alabama courts' struggle with MH arbitration alone exemplifies dissention regarding MH arbitration and the broader debates about arbitration's over-use in consumer contexts. *See* Hutchens, *supra* note 133, at 599–610 (noting political battles regarding consumer arbitration in Alabama and courts' varied decisions regarding enforcement of cost allocation provisions in consumer arbitration agreements).

[194] Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 119 (2001) (holding that the text of the FAA forecloses the argument that § 1 excludes all employment contracts from the FAA); Volt Info. Sci., Inc. v. Bd. of Tr., 489 U.S. 468, 472–73 (1989) (emphasizing that the FAA preempts state laws hostile to arbitration, and requires that courts strictly enforce valid contracts to arbitrate); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403–04 (1967) (directing that under the FAA a court must order arbitration to proceed once it finds a valid arbitration agreement under general state contract law).

differently than other contracts or is otherwise hostile to arbitration.[195] The FAA, therefore, preempts state attempts to preclude enforcement of arbitration clauses in MH contracts that affect interstate commerce.[196] In addition, the Court has narrowed the class of contractual challenges to arbitration that a court may determine as "gateway" arbitrability questions.[197]

## A. *Dwindling Success of Challenges to Arbitration Clauses Under the MMWA*

### 1. *Courts' General Acceptance That MMWA Claims May Be Subject to Arbitration Under the FAA*

The arbitration of statutory claims highlights the tensions between private lawmaking and public rights. Some commentators argue that corporate insiders' use of arbitration's private scheme improperly inhibits consumers' vindication and courts' development of public or statutory rights.[198] MH consumers use this argument with respect to warranty claims under the MMWA.[199] The MMWA seeks to prevent deception, improve the adequacy of information provided to consumers, and promote competition in

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[195] *See* Doctor's Assoc., Inc. v. Casarotto, 517 U.S. 681, 684 (1996) (confirming the FAA's application in federal and state courts to all contracts within the vast preemptive power of the Commerce Clause); Allied–Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 272 (1995) (same); Perry v. Thomas, 482 U.S. 483, 489 (1987) (same); Southland Corp. v. Keating, 465 U.S. 1, 15–21 (1984) (same).

[196] Some states limit or preclude binding arbitration of consumer warranty claims. *See, e.g.*, N.M. STAT. ANN. §§ 44-7A-1, 44-7A-5 (Michie 2004) (barring under the state's UAA any "disabling civil dispute clause" that limits "procedural rights necessary or useful to a consumer, borrower, tenant[,] or employee in the enforcement of substantive rights against a party drafting a standard form contract or lease"). Such state restrictions on enforceability of arbitration, however, are preempted by the FAA with respect to contracts within Congress's Commerce Clause powers. *Southland Corp.*, 465 U.S. at 14.

[197] *See* Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002) (emphasizing the narrow scope of issues that must be determined by the court in holding that an arbitrator must determine whether a dispute is barred by the limit in the NASD's arbitration procedures).

[198] *See, e.g.*, Sternlight, *supra* note 160, at 1, 5–22, 97–104 (discussing the effect of arbitration on consumers' access to class relief and proposing that companies should not be permitted to hinder consumers' vindication of statutory rights by clandestinely precluding their class actions).

[199] 15 U.S.C. §§ 2301–2312 (1998); *see also supra* Part III.A (discussing the use of arbitration to limit warranty liability in MH industry).

the marketing of consumer products.[200] To that end, the Act provides for a federal cause of action to enforce minimum standards for written warranties designated as full or limited.[201] Consumers complain that arbitration frustrates these goals by allowing violators to avoid public disclosure and accountability while simultaneously perpetuating contracting imbalances that result in warranty abuses.[202]

This conflict, along with the Act's language and history, drives some courts to hold that the MMWA bars binding arbitration of warranty claims under the Act. They emphasize that the Act only allows a warrantor to establish "an informal dispute settlement procedure."[203] They further explain that any such procedure must comply with Federal Trade Commission (FTC) requirements, which specify that these procedures must be non-binding.[204] The FTC regulations state that binding arbitration is not an "informal dispute settlement procedure," and, therefore, "reference within the written warranty to any binding, non-judicial remedy is prohibited by the Rule and the Act."[205]

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[200] 15 U.S.C. § 2302(a); Mace E. Gunter, *Can Warrantors Make an End Run? The Magnuson-Moss Act and Mandatory Arbitration in Written Warranties*, 34 GA. L. REV. 1483, 1487–89 (2000) (discussing purpose and history of MMWA).

[201] 15 U.S.C. § 2310(a)(3).

[202] *See id.*; *see also* Lamis, *supra* note 143, at 173–84 (arguing that the text, legislative history, and purposes of the MMWA should drive courts to refuse to enforce binding arbitration of MMWA claims); Garrett S. Taylor, *Read the Fine Print—Alabama Supreme Court Rules that Binding Arbitration Provisions in Written Warranties Are Okay*, 2001 J. DISP. RESOL. 165, 172–76 (disagreeing with the Alabama Supreme Court's decision in *Southern Energy Homes, Inc. v. Ard*, 772 So. 2d 1131 (Ala. 2000), to overturn its year-old decision and now hold MMWA claims arbitrable).

[203] 15 U.S.C. § 2310(a)(3).

[204] *Id.*; *see also* Browne v. Kline Tysons Imports, Inc., 190 F. Supp. 2d 827, 833 (E.D. Va. 2002) (holding MMWA precludes binding arbitration of warranty claims under the Act); Pitchford v. Oakwood Mobile Homes, Inc., 124 F. Supp. 2d 958, 962–65 (W.D. Va. 2000) (refusing to enforce arbitration of MH warranty claims under the MMWA due to the Act's intent to encourage alternative dispute settlement while not depriving any party of the right to vindicate warranty rights in court); Borowiec v. Gateway 2000, Inc., 772 N.E.2d 256, 263 (Ill. App. Ct. 2002) (holding that the MMWA precludes binding arbitration of express warranty claims); Parkerson v. Smith, 817 So. 2d 529, 539 (Miss. 2002) (holding that express warranty claims under the MMWA may not be subject to binding arbitration); Lamis, *supra* note 143, at 240–41 ("The very essence of the statute was tied up with the legislative recognition that consumers were *involuntarily* subjected to the terms of a warranty.") (emphasis added).

[205] FTC Rules, Regulations, Statements and Interpretations under Magnuson-Moss Warranty Act, 40 Fed. Reg. 60,168, 60,211 (Dec. 31, 1975); *see also* 16 C.F.R. § 700.8

The Supreme Court, however, has endorsed arbitrability of statutory claims and has rarely found that a statute provides clear congressional direction to the contrary.[206] Although the Court has not addressed the arbitrability of MMWA claims, it has upheld arbitration of consumer claims under TILA and employment claims under the Age Discrimination in Employment Act (ADEA).[207] The Court also rejected federal agency statements indicating that the Racketeer Influenced and Corrupt Organizations Act (RICO) and ADEA claims should not be subject to binding arbitration.[208] Most courts have seen this as a signal that MH consumers who agree to broad arbitration provisions must arbitrate their MMWA claims.[209]

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(2000) (stating that warrantors may not require binding arbitration); 16 C.F.R. § 703.5(j) (precluding binding arbitration).

[206] *See* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 481 (1989) (applying the FAA's "strong endorsement" of arbitration to encompass statutory claims). The Supreme Court has clearly stated that statutory rights are arbitrable, unless the statute forbids arbitration or arbitration will prevent a claimant from vindicating statutory rights. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 27 (1991) (finding claims under the ADEA arbitrable). In deciding whether a statute forbids arbitration, a court must consider the text of the statute, its legislative history, and whether arbitration clearly conflicts with the statute's purpose. Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 227 (1987).

[207] Green Tree Fin. Corp. v. Randolph, 531 U.S. 79, 89–92 (2000) (confirming parties' duty to arbitrate TILA claims under MH financing contract despite unclear arbitration costs); *Gilmer*, 500 U.S. at 33 (rejecting claims that arbitration favors employers and is not subject to sufficient judicial review to ensure fundamental fairness); *see also* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 123 (2001) (holding that the FAA preempts contrary state law to require arbitration of state common law and statutory claims, including employment discrimination claims).

[208] *See* Katie Wiechens, *Arbitrating Consumer Claims Under the Magnuson-Moss Warranty Act*, 68 U. CHI. L. REV. 1459, 1464 (2001) (discussing the Supreme Court's treatment of agency statements in *McMahon*, in which the Court refused to follow an SEC regulation barring arbitration of claims under the Securities Exchange Act, and noting the Court's rejection in *Gilmer* of EEOC indications that it deemed ADEA claims inarbitrable).

[209] *See* Davis v. Southern Energy Homes, Inc., 305 F.3d 1268, 1278 (11th Cir. 2002) (holding that the MMWA does not preclude binding arbitration under the FAA); Walton v. Rose Mobile Homes LLC, 298 F.3d 470, 476–79 (5th Cir. 2002) (holding MMWA claims arbitrable); Southern Energy Homes, Inc. v. Ard, 772 So. 2d 1131, 1141–45 (Ala. 2000) (holding that the MMWA does not invalidate all arbitration clauses); Stacy David, Inc. v. Consuegra, 845 So. 2d 303, 306–07 (Fla. Dist. Ct. App. 2003) (finding that MMWA claims are subject to binding arbitration agreements); Results Oriented, Inc. v. Crawford, 538 S.E.2d 73, 81 (Ga. Ct. App. 2000) (same); *In re* Am. Homestar of Lancaster, Inc., 50 S.W.3d 480, 492 (Tex. 2001) (same). Full discussion of

Accordingly, most courts find that the MMWA's reference to informal dispute settlement procedures has no bearing on binding arbitration agreements under the FAA.[210] These courts opine that the Act's text is "ambiguous at most" regarding binding arbitration because it only addresses "internal dispute settlement procedures."[211] These courts also find that FTC regulations barring binding arbitration of MMWA claims deserve no deference because they are unreasonable in light of the Supreme Court's pro-arbitration policy.[212] These same courts also conclude that binding arbitration does not conflict with MMWA purposes.[213] They do not seem bothered by consumers' inability to challenge the operation of an allegedly unfair dispute settlement procedure under state law.[214]

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arbitrability of MMWA claims and alleged conflict between the MMWA and the FAA is beyond the scope of this article, as it has been addressed by many commentators. *See, e.g.*, Katherine R. Guerin, *Clash of the Federal Titans: The Federal Arbitration Act v. The Magnuson-Moss Warranty Act: Will the Consumer Win or Lose?*, 13 LOY. CONSUMER L. REV. 4, 5–30 (2001) (discussing conflicting cases and the arbitrability of MMWA claims); Ryan Kauffman, Cunningham v. Fleetwood Homes of Georgia, Inc.*: Will Consumers Be Required to Arbitrate Their Magnuson-Moss Claims?*, 19 T.M. COOLEY L. REV. 361, 361–85 (2002) (same); Lamis, *supra* note 143, at 173, 175–248 (same); Shelly Smith, *Mandatory Arbitration Clauses in Consumer Contracts: Consumer Protection and the Circumvention of the Judicial System*, 50 DEPAUL L. REV. 1191, 1198–1250 (2001) (same); Wiechens, *supra* note 208, at 1460–86 (same).

[210] *See Davis*, 305 F.3d at 1275 (finding that the MMWA's text does not directly address binding arbitration, and its regulation of informal dispute settlement procedures "does not mean that the Act precludes a court from enforcing a valid binding arbitration agreement").

[211] *Id.*

[212] *See id.* at 1276; *see also* Lamis, *supra* note 143, at 173–95, 214–44 (discussing and critiquing cases addressing arbitrability of MMWA claims); Wiechens *supra* note 208, at 1466–78 (discussing courts' approaches to the FTC regulations).

[213] *See, e.g.*, *Davis*, 305 F.3d at 1279–80 (emphasizing FTC regulations are unreasonable in light of the Court's holdings that "arbitration is favorable to the individual"); Wiechens, *supra* note 208, at 1475–77 (noting that the Court endorsed arbitration of consumer protection claims in *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 88–92 (2000)).

[214] Wolf v. Ford Motor Co., 829 F.2d 1277, 1279–80 (4th Cir. 1987) (holding that the MMWA preempted state fraud action challenging operation of dispute settlement procedure because the Act grants the FTC authority to ensure compliance with its minimum standards). The MMWA grants the FTC authority to investigate complaints regarding manufacturers' dispute settlement procedures, and allows the FTC to seek remedial action, including injunction proceedings, against a non-complying procedure. 15 U.S.C. §§ 2310(a)(4), 2310(c)(1).

As the Comments to the Revised Uniform Arbitration Act (RUAA) explain, "arbitration is a consensual process in which autonomy of the parties who enter into arbitration agreements should be given primary consideration, so long as their agreements conform to notions of fundamental fairness."[215] The question is whether and when MH arbitral regimes are in fact "consensual" and "conform to notions of fundamental fairness." Fairness aside, current uncertainty regarding arbitrability of MH consumers' MMWA claims diminishes arguable efficiencies by hindering insiders' from anticipating and passing on economic savings to consumers from their arbitration programs.[216] Furthermore, consumers and insiders suffer needless delays and costs when they must pursue MMWA litigation and breach of contract arbitration on the same issues.[217] Indeed, the courts also suffer when their dockets are clogged with redundant litigation and consumer challenges of arbitration agreements.

### 2. *Some Courts' Willingness to Void Particular Arbitration Provisions That Clash with MMWA Rights*

Due to the limited success of generalized attacks on arbitrability of MMWA claims, consumers increasingly challenge arbitration agreements on the basis that a particular agreement violates or improperly curtails their rights under the Act.[218] Using the Supreme Court's words, consumers argue that an arbitration provision does not allow them "effectively [to] vindicate [their] statutory cause of action in the arbitral forum."[219] The question then

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[215] Christopher R. Drahozal, *Contracting Around RUAA: Default Rules, Mandatory Rules, and Judicial Review of Arbitral Awards*, 3 PEPP. DISP. RESOL. L.J. 419, 421–22 (2003) (quoting the official Comments to the RUAA).

[216] *See* Walton v. Rose Mobile Homes LLC, 298 F.3d 470, 476–79 (5th Cir. 2002) (recognizing courts' disagreement regarding enforcement of binding arbitration of MMWA claims).

[217] *See, e.g.*, *Ex parte* Thicklin, 824 So. 2d 723, 730–35 (Ala. 2002) (allowing litigation of MMWA claims, but ordering arbitration of remaining claims under MH sales agreement).

[218] *See id.* at 728–30 (arguing by consumer that even if MMWA claims may be arbitrable, the arbitration clause in this case was unenforceable under the MMWA because it was not disclosed in the written MH warranty and it precluded the consumers from vindicating their statutory rights by burdening them with costs of arbitration).

[219] *See* CHRISTOPHER R. DRAHOZAL, COMMERCIAL ARBITRATION: CASES AND PROBLEMS 191–204 (2002) (quoting the Court in *Gilmer* and addressing how parties challenge arbitration of statutory claims based on procedures required by a particular arbitration agreement).

becomes whether an arbitration provision allows a claimant to vindicate rights provided by the MMWA.

In some cases, consumers argue that an arbitration provision violates the MMWA because it is not properly disclosed in a written warranty.[220] In *Ex Parte Thicklin*, for example, a MH buyer sought to vacate an order compelling arbitration of her MMWA claims against a MH seller and manufacturer.[221] Not long before *Thicklin*, the Alabama Supreme Court had fluctuated on the arbitrability of MMWA claims.[222] The *Thicklin* court, therefore, first clarified that MMWA claims generally are arbitrable. The court held, however, that the Act precluded arbitration of the consumer's express warranty claims because the arbitration provision in his case was in his MH purchase agreement, but not in the manufacturer's separate written warranty.[223] The court concluded that failure to disclose the arbitration requirement in the written warranty violated the MMWA's consumer disclosure provisions.[224]

Like the Alabama court, the Federal Court of Appeals for the Eleventh Circuit also has drawn fine distinctions among warranty claims in determining their arbitrability under the MMWA. Prior to 2002, the Eleventh Circuit had indicated in dicta that the MMWA precluded arbitration of written warranty claims, although it allowed arbitration of implied and oral

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[220] *See Thicklin*, 824 So. 2d at 728–29 (finding that the particular arbitration clause violated the MMWA).

[221] *Id.* at 726–28.

[222] *Id.* at 728–29; Southern Energy Homes, Inc. v. Ard, 772 So. 2d 1131, 1134 (Ala. 2000). The opinions in Alabama concerning MH warranty claims are confusing. *See, e.g.*, Hutchens, *supra* note 133, at 599–603 (noting the myriad of political issues regarding arbitration in Alabama); Ware, *supra* note 147, at 606–10 (discussing how Alabama Supreme Court judges' votes on arbitration issues coincide with whether they are supported by business and corporate interests and finding that in all nine cases regarding interpretation of arbitration clauses decided prior to the period when "plaintiff's-lawyer-funded justices held a majority on the court," a majority of justices found the claims inarbitrable, while in all four cases after "business-funded justices gained a majority on the court," the court upheld arbitration of the claims at issue).

[223] *Thicklin*, 824 So. 2d at 728–31 (relying on *Cunningham v. Fleetwood Homes of Georgia, Inc.*, 253 F.3d 611, 623–24 (11th Cir. 2001)).

[224] *Id.* at 728–30; *see also* Homes of Legend, Inc. v. McCollough, 776 So. 2d 741, 746–48 (Ala. 2000) (finding that, although an arbitration clause required compliance with the AAA rules that called for binding arbitration, the clause should be construed to require nonbinding arbitration in light of the contract's warranty requiring compliance with FTC regulations, which the court read to preclude binding arbitration of MMWA claims).

express warranty claims.[225] In 2002, however, the court held that the MMWA does not preclude enforcement of arbitration agreements contained in written warranties.[226] Nonetheless, the court concluded that a MH manufacturer could not compel arbitration based on its third-party beneficiary status under an arbitration clause in a MH retail agreement separate from the written warranty.[227] The court emphasized that this "unique" contractual arrangement violated MMWA disclosure obligations by "failing to disclose in a single document all relevant terms of the warranty."[228]

Consumers also argue that particular arbitration provisions preclude their vindication of MMWA rights by improperly limiting or excluding remedies or procedures otherwise available to consumers under the Act.[229] For example, MH consumers have challenged arbitration agreements that preclude recovery of attorneys' fees and class relief remedies that would be available to consumers pursuing MMWA claims in court.[230] They also have

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[225] *See* Richardson v. Palm Harbor Homes, Inc., 254 F.3d 1321, 1325–26 (11th Cir. 2001) (finding that any arguable preference for nonbinding arbitration under the MMWA only applies to written warranties, and does not preclude binding arbitration of oral express warranty claims); *Cunningham*, 253 F.3d at 616–20 (11th Cir. 2001) (intimating that written warranty claims are not arbitrable under the MMWA, but finding that the mention of nonbinding arbitration in the MMWA text does not preclude binding arbitration of all MMWA claims).

[226] Davis v. Southern Energy Homes, Inc., 305 F.3d 1268, 1271–72 (11th Cir. 2002) (holding that "the MMWA permits the enforcement of valid binding arbitration agreements within written warranties").

[227] *Cunningham*, 253 F.3d at 622–23.

[228] *Id.* at 622. The court reiterated that it was not deciding whether MMWA claims may be subject to binding arbitration when properly disclosed in a written warranty. *Id.* at 623. Nonetheless, shortly after the court decided *Cunningham*, it concluded in *Richardson* that oral express warranty claims under the MMWA claims may be subject to binding arbitration. *Richardson*, 254 F.3d at 1327.

[229] *See* Green Tree Fin. Corp. v. Randolph, 531 U.S. 79, 90 (2000) (denying a MH consumer's challenge of arbitration based on potential arbitration costs but acknowledging that consumer may be able to show high arbitration costs would make her "unable to vindicate her statutory rights in arbitration"); *see also Thicklin*, 824 So. 2d at 730–31 (arguing by consumer that the arbitration clause violated the MMWA by imposing costs of arbitration on consumers seeking to vindicate statutory rights).

[230] *See* Consumers Union, *supra* note 142 (discussing costs and procedures that create "tremendous perils for consumers"); *see also supra* note 155 (discussing arbitration costs).

attacked arbitration agreements that bar an arbitrator from awarding statutory punitive and treble damages.[231]

In addition, MH consumers have argued that arbitration agreements requiring consumers to bear their own costs effectively preclude them from bringing their statutory claims.[232] A MH consumer in *Green Tree Financial Corp. v. Randolph* launched this type of "prohibitive cost" attack on arbitrability of claims.[233] The Court rejected the consumer's attack, however, because her arbitration agreement's silence regarding costs did not establish that she would in fact be required to pay prohibitively high costs.[234] This requisite showing of prohibitive costs remains a mystery.[235]

As with generalized attacks on the arbitrability of MMWA claims, these particularized challenges are fraught with uncertainties and inefficiencies. Consumers who succeed often must arbitrate contract and tort claims before they may litigate the MMWA claims.[236] A court also may compel arbitration of implied and oral warranty claims, although it allows consumers to litigate written warranty claims.[237] In addition, courts may order consumers to

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[231] *See* Anders v. Hometown Mortgage Service, Inc., 346 F.3d 1024, 1027–33 (11th Cir. 2003) (ordering arbitration and holding that an arbitrator must decide mortgagors' argument that an arbitration provision precluding mortgagors from recovering statutory punitive and treble damages violated TILA and the Real Estate Settlement Procedures Act (RESPA)).

[232] *See generally Randolph*, 531 U.S. at 79 (challenging by MH consumers of enforceability of arbitration agreement as to TILA claims where the agreement was ambiguous regarding who must pay arbitration costs); *see also supra* notes 154–60 and accompanying text (discussing cost challenges).

[233] *Randolph*, 531 U.S. at 89–92. This is a separate argument from the unconscionability and other contract defense arguments discussed below, because the argument is directed at whether a consumer is precluded from vindicating statutory or public rights, and is not directed at the enforceability of the arbitration agreement as to all claims under a contract. *See id.* (challenging arbitrability of TILA claims under this argument). Presumably, this means that a consumer who succeeds on such a challenge with respect to a statutory claim may nonetheless be compelled to arbitrate other claims arising under the contract.

[234] *Id.* at 89–91. The Court seems to adopt a "wait-and-see" attitude.

[235] *Id.* at 90–93; *see also Ex parte* Thicklin, 824 So. 2d 723, 730 (Ala. 2002) (disregarding MH consumer's claims that the arbitration clause in her sales and financing contract was unenforceable because it imposed costs and expenses that would preclude her from pursuing MMWA statutory claims).

[236] Browne v. Kline Tysons Imp., Inc., 190 F. Supp. 2d 827, 833 (E.D. Va. 2002) (allowing litigation of MMWA claims, but ordering arbitration of TILA and state statutory and common law claims arising out of an automobile sale).

[237] *See* Richardson v. Palm Harbor Homes, Inc., 254 F.3d 1321, 1323–26 (11th Cir. 2001) (noting that the MH consumers had been compelled to arbitrate implied warranty

arbitrate warranty claims against some, but not all, of the parties who may bear responsibility for the claims.[238] For example, a court may compel MH consumers to arbitrate claims against a retailer, but not MMWA claims against the manufacturer.[239] This uncertain enforcement and allowance for parallel litigation and arbitration results in inefficiencies for all disputants and the courts.

### B. *Uncertain Challenges to Arbitration Based on Contract Defenses*

Hurdles to arbitrability challenges based on the MMWA have relegated MH consumers' prime attacks on arbitration to contract defenses.[240] Consumers must argue that their arbitration agreements are unenforceable based on contract defenses such as unconscionability, fraud, and lack of

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claims against the MH retailer, and that the MMWA arguably would only preclude binding arbitration of written warranty claims—although the same court later upheld the enforceability of arbitration agreements contained within written warranties); Cunningham v. Fleetwood Homes of Georgia, Inc., 253 F.3d 611, 612, 623–24 (11th Cir. 2001) (noting that the MH consumers were required to arbitrate their fraud, mental anguish and emotional distress, negligence and wantonness, breach of contract, breach of implied warranty, and violation of the Alabama Extended Manufacturer's Liability Doctrine claims, but holding they were not required to arbitrate their written and express warranty claims against the MH manufacturer).

[238] Some courts use third-party beneficiary and estoppel principles to compel consumers to arbitrate claims against both signatories and non-signatories to contracts containing arbitration clauses. *See Ex parte* Gates, 675 So. 2d 371, 374–75 (Ala. 1996) (enforcing arbitration against a consumer on behalf of non-signatory manufacturer based on broad arbitration clause). *But see Ex parte* Jones, 686 So. 2d 1166, 1166–68 (Ala. 1996) (withdrawing a prior opinion, and holding that there was no agreement to arbitrate between consumers and the non-signatory to the arbitration agreement); *Ex parte* Martin, 703 So. 2d 883, 889 (Ala. 1996) (holding that an arbitration clause in a loan agreement between buyers and sellers did not apply to manufacturer); *see also* David F. Sawrie, *Equitable Estoppel and the Outer Boundaries of Federal Arbitration Law: The Alabama Supreme Court's Retrenchment of an Expansive Federal Policy Favoring Arbitration*, 51 VAND. L. REV. 721, 723–51 (1998) (discussing the application of estoppel in enforcing arbitration agreements and Alabama courts' struggle with these estoppel issues in MH cases).

[239] The MH consumers in *Cunningham* had been compelled to arbitrate all of their claims against the retailer and manufacturer, except for their written and express warranty claims against the manufacturer, based on their arbitration agreement with the retailer. *Cunningham*, 253 F.3d at 613, 623–24. The court accepted the manufacturer's third-party beneficiary status under the consumer retail agreement. *Id.* at 613–14.

[240] *See supra* notes 194–97 and accompanying text (discussing the Supreme Court's relegation of consumer challenges of arbitration agreements to contract defenses).

consideration.[241] The Supreme Court has also narrowed these challenges to those aimed exclusively at an arbitration clause, and not the underlying agreement.[242] Courts have confirmed that consumers may not successfully challenge arbitration as "inherently unfair to consumers" or an automatically voidable product of unequal bargaining power.[243] Instead, consumers pursuing a contract defense must prove the elements of the defense under contract law.[244]

### 1. *Unconscionability*

Consumers often raise tandem unconscionability and particularized MMWA arguments based on essentially the same facts.[245] A consumer challenging an arbitration agreement as unconscionable, however, generally must show that the agreement is both substantively and procedurally unconscionable.[246] Procedural unconscionability asks whether the bargaining process was unduly one-sided, whereas substantive unconscionability focuses on whether the terms of an arbitration provision are oppressive or

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[241] *See* Walton v. Rose Mobile Homes LLC, 298 F.3d 470, 478 (5th Cir. 2002) (rejecting MH consumers' challenge of arbitration under the MMWA, but emphasizing that "courts can consider individual claims of fraud or unconscionability in arbitration agreements as they would in any other contract").

[242] Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403–04, 411, 421–23 (1967) (applying "separability" to find courts may only consider attacks on an arbitration clause and not those aimed at an underlying contract).

[243] *See Walton*, 298 F.3d at 478 (citing *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995)).

[244] *Id.*

[245] *See Ex parte* Thicklin, 824 So. 2d 723, 730–34 (Ala. 2002) (launching by consumer of statutory and unconscionability attacks on arbitration); Rickard v. Teynor's Homes, Inc., 279 F. Supp. 2d 910, 914–15 (N.D. Ohio 2003) (addressing MH purchaser's challenge of an arbitration agreement as unconscionable and as a violation of the MMWA).

[246] A court may invalidate all or part of an arbitration agreement on the basis of unconscionability, and often challengers argue that an arbitration agreement's provisions are unconscionable because they unduly curtail statutory remedies or procedures. *See* Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1174–75 (9th Cir. 2003) (finding that the one-year limitation on claims under arbitration agreement in employment contract was substantively unconscionable because it deprived employees of the benefit of the continuing violations doctrine available under a state employment discrimination statute); *see also* Alexander v. Anthony Int'l, L.P., 341 F.3d 256, 264–70 (3rd Cir. 2003) (noting both elements of unconscionability under most state contract law).

otherwise unfair.[247] MH consumers may satisfy the procedural unconscionability prong by showing their arbitration provision was in a MH insider's preprinted form.[248] Furthermore, many MH insiders bury arbitration provisions in package deals that consumers accept as conditions to buying homes.[249]

The adhesive nature of a MH agreement, however, does not necessarily void the contract.[250] Instead, a consumer also must satisfy the substantive prong of the unconscionability defense by showing that an arbitration agreement requires unduly oppressive or unreasonable terms.[251] Examples of arbitration terms that courts have held substantively unconscionable include terms giving the stronger bargaining party an option to litigate, imposing high arbitration costs and fees, requiring consumers to arbitrate in inconvenient locations, and strictly limiting damages and remedies.[252] In one case, for example, a MH purchaser challenged a retailer's motion to compel arbitration on the basis that the arbitration agreement was unconscionable because it allowed the retailer to choose the arbitrator.[253] The court held that

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[247] *See Alexander*, 341 F.3d at 265–66 (finding that a "take-it-or-leave-it" contract prepared by the employer without negotiation by the employees was procedurally unconscionable).

[248] *See supra* Part II.B.2.a (discussing dominant bargaining power of MH insiders over consumers); *see also Alexander*, 341 F.3d at 265 (describing adhesion contracts).

[249] *See supra* notes 87–88 (discussing high-pressure package deals in MH transactions).

[250] Torrance v. Aames Funding Corp., 242 F. Supp. 2d 862, 870 (D. Or. 2002) (emphasizing that adhesion contracts are not necessarily unenforceable).

[251] Hammond, *supra* note 184, at 602–04 (discussing the Court's adoption of a "contractual approach" for determining enforceability of arbitration agreements and the two-prong unconscionability analysis that requires substantive and procedural unfairness).

[252] *See* DRAHOZAL, *supra* note 219, at 113–14 (stating a list of suspect terms and compiling supporting cases indicating courts' disagreement on the unconscionability of these terms).

[253] Harold Allen's Mobile Home Factory Outlet, Inc. v. Butler, 825 So. 2d 779, 781 (Ala. 2002). With respect to arbitrator selection, the arbitration clause provided:

> *The SELLER shall have the right to select an arbitrator* who shall arbitrate any disagreement, claim, demand or other dispute between the SELLER and the BUYER, having all powers as may be provided for by law, by regulation, by legislative act or otherwise; provided, however, that *no arbitrator may be selected by the SELLER who shall have provided legal representational services to or for the SELLER at any time.*

*Id.* (emphasis original). The court observed that the "paucity of precedent in this area of the law bespeaks a commendable lack of chutzpah on the part of the business

the arbitrator selection provision was unconscionable as a matter of law because it "offended fundamental notions of fairness" in such a way that "no sensible person with a range of choices would agree to."[254] The court distinguished selection provisions that condition arbitrator selection on the other party's consent.[255] The court also narrowed the consumer's remedy by affirming the trial court's order to arbitrate with a court-appointed arbitrator.[256]

These unconscionability cases are uncertain at best. Courts seem to increasingly deny MH consumers' unconscionability arguments.[257] For example, the Alabama Supreme Court shifted its view since 1998 to curtail unconscionability challenges of arbitration agreements.[258] In one recent case,

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community." *Id.* at 785. Presumably, this provision would have been valid if it had not been the product of procedural unconscionability, but the court assumes the adhesive nature of MH transactions. *See id.* at 786 (See, J., concurring) (emphasizing that this agreement would be enforceable if it were not "one of adhesion").

[254] *Id.* at 784.

[255] *Id.* at 783–84 (citing MH cases upholding such provisions); *see also supra* note 52 (discussing Conseco's form agreement, which allowed Conseco to choose the arbitrator, subject to the MH consumer's consent).

[256] *Butler*, 825 So. 2d at 785.

[257] *See, e.g.*, Fleetwood Enters., Inc. v. Gaskamp, 280 F.3d 1069, 1077 (5th Cir. 2002) (denying an unconscionability challenge to MH arbitration agreement); Conseco Fin. Corp. v. Boone, 838 So. 2d 370, 372–73 (Ala. 2002) (denying a challenge of MH arbitration agreement based on remedy and damage limitations); Green Tree Fin. Corp. v. Lewis, 813 So. 2d 820, 825 (Ala. 2001) (denying an unconscionability challenge to arbitration clause by illiterate MH consumer); Johnnie's Homes, Inc. v. Holt, 790 So. 2d 956, 963–65 (Ala. 2001) (enforcing the MH consumer's duty to arbitrate warranty, fraud, breach, and other claims arising out of MH purchase); Crawford v. Results Oriented, Inc., 548 S.E.2d 342, 343 (Ga. 2001) (denying an MH consumer's arbitrability challenge based on risk of high arbitration costs); Conseco Fin. Servicing Corp. v. Wilder, 47 S.W.3d 335, 342–45 (Ky. Ct. App. 2001) (upholding Conseco's form arbitration provision with carve-out for lender actions and unknown costs); Garcia v. Wayne Homes, LLC, No. 2001CA53, 2002 Ohio App. LEXIS 1917, at *3 (Ohio Ct. App. Apr. 19, 2002) (denying an unconscionability challenge based on risk of prohibitive arbitration costs); *In re* Firstmerit Bank, N.A., 52 S.W.3d 749, 756–58 (Tex. 2001) (denying an unconscionability challenge to MH arbitration despite carve-out for lender actions and evidence of high arbitration costs);. *But see* Mendez v. Palm Harbor Homes, Inc., 45 P.3d 594, 604–07 (Wash. Ct. App. 2002) (holding an arbitration clause in a MH consumer contract unconscionable due to prohibitive arbitration costs where consumer showed that it would be economically infeasible for him to arbitrate his $1,500 claim because he earned only $12,000 per year and arbitration would cost roughly $2,000).

[258] *See* Ware, *supra* note 147, at 620–21 (analyzing Alabama arbitration cases and concluding that, "Unconscionability challenges to arbitration agreements have fared poorly in the Supreme Court of Alabama since March 23, 1998, when business-funded

the court denied a MH consumer's unconscionability challenge to an arbitration provision, even though the consumer had only a sixth-grade education and did not understand the terms of his adhesive MH agreement.[259] The court also found the provision fully enforceable despite its carve-out allowing the retailer and lender or assignee to go directly to court for collection actions.[260] Furthermore, the court refused to void the provision's requirement that the low-income consumer pay a $2,000 filing fee to even initiate arbitration.[261]

### 2. *Fraud and Misrepresentation*

Fraud and misrepresentation are additional contract defenses consumers use to challenge arbitration agreements. Often consumers argue these defenses in conjunction with unconscionability.[262] Fraud, however, is especially difficult to prove, and, as with all contract defenses, a court will not hear a fraud challenge to arbitration unless the alleged fraud is specifically directed to the arbitration clause.[263] To prevail on a fraud claim, a consumer generally must show:

> (1) that a material representation was made; (2) the representation was false; (3) when the representation was made, the speaker knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion; (4) the speaker made the representation with the intent that the

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justices gained a majority on the court"); Hutchens, *supra* note 133, at 608–10 (discussing Alabama cases denying challenges based on high arbitration costs).

[259] *Johnnie's Homes*, 790 So. 2d at 960–65.

[260] *Id.*

[261] *Id.* at 965. *Cf.* Anderson v. Ashby, 873 So. 2d 168, 174–84 (Ala. 2003) (per curiam) (finding arbitration clause in credit-life insurance transaction was unconscionable where borrower was illiterate and form arbitration provision limited damages and preserved lender's right to litigate foreclosure and collection claims); Leonard v. Terminix Int'l Co., L.P., 854 So. 2d 529, 534–39 (Ala. 2002) (per curiam) (finding an arbitration clause in an insect control contract was unconscionable because it precluded class actions, thereby depriving consumers of a remedy by making it impracticable to pursue the small dollar claims allowable in light of the damages limitation).

[262] *See, e.g.*, *Firstmerit Bank*, 52 S.W.3d at 756–58 (challenging by MH consumers of arbitration based on fraud, along with unconscionability, duress, and revocation).

[263] Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 402–04 (1967) (holding per the separability doctrine that fraud in the inducement is an arbitrability question for the court only when it goes to the arbitration clause, not the underlying contract).

other party should act upon it; (5) the party acted in reliance on the representation; and (6) the party thereby suffered injury.[264]

Consumers struggle to prove these fraud elements. In *In re Firstmerit Bank*, for example, MH purchasers challenged an arbitration provision in a MH sales agreement based on allegations that the sellers fraudulently represented their ownership of the land under the MH and existence of a septic system and driveway.[265] The purchasers also alleged that the sellers improperly failed to disclose or explain an arbitration addendum, and that this was a material nondisclosure because the addendum had a carve-out allowing the lender to judicially foreclose and repossess the MH despite the purchasers' duty to arbitrate their breach of warranty, deceptive practices, and other claims.[266] The court curtly denied the fraud claim, however, because the purchasers had not shown that "the sellers actually misrepresented" the terms of the arbitration addendum.[267]

Consumers rarely avoid arbitration based on these nondisclosure arguments.[268] Sellers generally have no duty to disclose or explain to consumers the significance of arbitration provisions.[269] Moreover, MH consumers enjoy little success on such fraud challenges to arbitration despite its preclusive effects on consumers' access to statutory judicial remedies.[270]

### 3. *Assent*

A consumer generally cannot avoid arbitration based on a failure to read or understand an arbitration clause.[271] However, a consumer may challenge an arbitration clause based on a lack of voluntary consent.[272] Consumers must show that they either never agreed to arbitrate, or that they signed an

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[264] *Firstmerit Bank*, 52 S.W.3d at 758.

[265] *Id.*

[266] *Id.* at 752–53, 758.

[267] *Id.* at 758.

[268] *See* Torrance v. Aames Funding Corp., 242 F. Supp. 2d 862, 869–70 (D. Or. 2002) (denying fraud claim).

[269] *Id.* (emphasizing no duty to disclose or explain arm's length written agreements).

[270] *See* Prudential Ins. Co. of Am. v. Lai, 42 F.3d 1299, 1304–05 (9th Cir. 1994) (breaking from the majority of courts by holding employee only could be compelled to arbitrate her Title VII claims if she expressly waived her access to statutory remedies in court).

[271] *Torrance*, 242 F. Supp. 2d at 869–70.

[272] *See Ex parte* Early, 806 So. 2d 1198, 1200–02 (Ala. 2001) (arguing economic duress).

agreement under duress.[273] To prove duress, a consumer generally must provide sufficient evidence that the seller essentially forced the consumer to accept the MH contract despite the objectionable arbitration clause.[274]

In *Ex parte Early*, for example, the Earlys resisted arbitration under a provision in their MH purchase installment agreement based on economic duress.[275] Mr. Early provided an affidavit stating that he objected to the arbitration provision in the agreement at the time he and his wife purchased the MH. He signed the agreement, however, because the MH vendor told him he would lose the down payment of more than $4,000 unless he agreed to the provision and concluded the MH purchase.[276] The Earlys claimed this acceptance was "involuntary and under economic duress."[277] Under these facts, the court remanded for further discovery on the duress issue because the Earlys had provided a predicate showing of need for supporting evidence that they could not obtain without discovery.[278]

Assent issues also lie at the heart of MH consumers' claims that their contracts do not incorporate arbitration provisions, or that warranty claims exceed the scope of their arbitration provisions.[279] In *Marcinko v. Palm Harbor Homes, Inc.*, for example, MH consumers signed an arbitration addendum and a MH purchase contract on different dates. They argued that this timing difference precluded arbitration of disputes arising out of the MH purchase.[280] The court rejected their argument, however, because the purchase contract incorporated the arbitration provision.[281] The court held that this incorporation was sufficient to indicate consumers' assent to

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[273] *Id.* at 1201–02.

[274] *Id.* at 1202.

[275] *Id.* at 1200.

[276] *Id.* at 1202.

[277] *Id.*

[278] *Id.* at 1202–03. In its opinion, however, the court seems to decree a higher level of consent regarding arbitration than for other contract terms. The court states that an arbitration agreement "is a waiver of a party's right to a jury trial," and any waiver must be made "knowingly, willingly and voluntarily." *Id.* at 1201. This is a higher standard than most courts apply. *See* Green Tree Fin. Corp. v. Lewis, 813 So. 2d 820, 825 (Ala. 2001) (denying unconscionability challenge to arbitration clause by illiterate MH consumer).

[279] *See* Marcinko v. Palm Harbor Homes, Inc., No. 01CA677, 2002 WL 1438658, *3 (Ohio Ct. App. June 21, 2002) (arguing by MH consumers that arbitration agreement never became part of the MH purchase contract).

[280] *Id.* at *2–3.

[281] *Id.* at *3–4.

arbitrate their breach, fraud, and sales practices claims against the MH vendor.[282]

Other assent challenges to arbitration aim to preclude arbitration of certain claims, or claims against nonsignatories to an agreement.[283] In *Ex parte Gates*, for example, MH consumers unsuccessfully argued that an arbitration clause on the back of their MH retail installment contract did not cover fraud, negligence, warranty, and MMWA claims against the retailer and the manufacturer of the MH.[284] The clause covered "[a]ll disputes, claims, or controversies arising from or relating to this Contract or the relationships which result from this Contract, or the validity of this arbitration clause or the entire Contract . . . ."[285] A court could have interpreted "this Contract" to narrowly cover only breach of contract claims against the signatory retailer. Instead, this court found the language broadly covered all the consumers' claims against the retailer and the nonsignatory manufacturer because all the claims were "asserted in connection with" the retail contract.[286]

Courts disagree regarding these assent cases, especially with respect to third-party claims. The Alabama Supreme Court alone shifted its view on the third-party issue after *Gates*.[287] In *Ex parte Jones*, the Court first held that the broad arbitration clause in a car loan agreement covered the consumers' claims against their car insurance provider because the provider sold and financed the insurance in conjunction with the loan agreement.[288] After a

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[282] *Id.* at *4 (indicating no higher level of consent necessary to waive trial rights).

[283] *See Ex parte* Gates, 675 So. 2d 371, 374–75 (Ala. 1996) (arguing by MH consumers that misrepresentation and warranty claims against MH retailer and manufacturer were outside the scope of an arbitration clause in their sale and financing agreement).

[284] *Id.* at 373–75. The contract was signed by Gates and the general manager of the retailer in his representative capacity, and referred to the retailer as the "Seller, Secured Party," and Green Tree Financial Corporation as the "assignee." *Id.* at 373.

[285] *Id.*

[286] *Id.* at 374–75. The court found the claims within the scope of the agreement in connection with finding that the FAA preempted Alabama law precluding enforcement of pre-dispute arbitration agreements. *Id.*

[287] *See supra* notes 147, 222 and 258 (discussing Professor Ware's findings regarding the Alabama Supreme Court's arguably conflicting decisions regarding scope of arbitration agreements, and the decisions' relationship to the politics of the court); *supra* notes 193, 202 and accompanying text (discussing the same court's struggles and quick reversal on the arbitrability of MMWA claims).

[288] *Ex parte* Jones, 686 So. 2d 1166, 1168–71 (Ala. 1996) (Maddox, J., dissenting) (quoting from the court's original opinion issued May 31, 1996, but withdrawn and substituted September 13, 1996 after *reh'g ex mero motu*).

*rehearing ex mero motu*, however, a majority of the Court withdrew the original opinion, and held that the arbitration clause did not apply to claims against the insurer with whom the consumers never agreed to arbitrate.[289] The majority did not cite or discuss the Court's prior opinion in *Gates*.[290] The dissent argued that *Gates* established broad interpretation of such arbitration agreements to cover claims against third parties arising out of the transaction containing the arbitration agreement.[291]

Less than two months later, in *Ex parte Martin*, the Alabama Supreme Court again faced the question of whether an arbitration agreement covered claims against non-signatories to the agreement.[292] In that case, MH consumers sought to vacate an order compelling them to arbitrate warranty claims against a MH manufacturer. The arbitration clause in the consumers' MH purchase agreement covered claims "arising out of or relating to that contract, or breach thereof, between [the retailer] and [the consumers] . . . ."[293] The Court distinguished *Gates* on grounds that the arbitration agreement "was particularly broad, encompassing not only the 'disputes, claims, or controversies arising from' the contract, but also 'the relationships' that resulted from it."[294] The Court summarily concluded the agreement at issue was narrower than that in *Gates*, and therefore the consumers did not have to arbitrate their claims against the manufacturer.[295]

In all of these cases, the majority opinions focused on assent or contract interpretation issues. Another way to approach these third-party cases is to analyze enforceability under an estoppel theory. Estoppel principles

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[289] *Id.* at 1167–68 (emphasizing that the written arbitration agreement referred to "creditor and debtor," and thus was limited to disputes between those parties).

[290] *Id.* at 1168 (emphasizing that one "cannot be required to submit to arbitration any dispute he has not agreed to submit") (quoting Old Republic Ins. Co. v. Lanier, 644 So. 2d 1258, 1260 (Ala. 1994)).

[291] *Id.* at 1170–71 (emphasizing that the arbitration clause broadly covered "[a]ll disputes, controversies or *claims of any kind and nature* between creditor and debtor *arising out of or in connection with the within agreement*") (emphasis original). Justice Maddox also lamented that the court "changed its mind" after the *Gates* opinion had been criticized in the Alabama Trial Lawyers Journal, seemingly intimating that the court had been swayed by politics and public opinion. *Id.*

[292] *Ex parte* Martin, 703 So. 2d 883, 884–85 (Ala. 1996).

[293] *Id.* at 885.

[294] *Id.* at 885–86.

[295] *Id.* at 887. As the dissent pointed out, the *Gates* language was not very different from the instant language in that the consumers agreed to arbitrate not only claims "arising out of," but also those "*relating to that contract*, or breach thereof" between them and the MH retailer. *Id.* at 888–89 (Hooper, C.J., dissenting) (emphasis original).

generally call courts to compel a signatory to an arbitration agreement to arbitrate claims against a non-signatory if the signatory must rely on the agreement in asserting the claims, or if the signatory's allegations involve substantially interdependent and concerted misconduct by the non-signatory with a signatory to the agreement.[296] Courts may compel a signatory to arbitrate in these cases because at least a signatory agreed to arbitrate with someone. Courts constrain their compulsion of non-signatories, however, to cases where it is proper to compel arbitration on agency, assumption, alter ego, or circumscribed estoppel grounds.[297]

The third-party issues raise thorny questions for MH warranty claimants because MH transactions typically involve multiple parties and contracts. If an arbitration agreement appears only in the MH sales or financing agreement, then questions arise regarding the consumers' duties to arbitrate warranty and MMWA claims against the manufacturer. Furthermore, confusing judicial analysis of these questions causes inefficiencies, especially when the analysis results in parallel litigation and arbitration.

### 4. *Lack of Consideration*

Another uncertain and fact-specific challenge to arbitration is lack of consideration. It is generally not very difficult for proponents of arbitration to show adequate consideration. Proponents need only show that the arbitration provision is mutual or that it is part of a larger exchange (*e.g.*, the arbitration clause is one of many promises parties exchange in a MH transaction). MH consumers nonetheless launch lack of consideration attacks.

In one case, MH consumers alleged the separate arbitration provision was not supported by adequate consideration because they signed the purchase agreement and arbitration provision at different times.[298] The court dismissed the lack of consideration defense because the consumers had not properly preserved the defense in the lower court.[299] However, it seems the court would have denied the defense on the merits in light of its finding that

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[296] *See* MS Dealer Serv. Corp. v. Franklin, 177 F.3d 942, 947 (11th Cir. 1999) (stating how estoppel principles are applied in arbitration cases); *see also supra* note 238 (gathering estoppel cases).

[297] *See, e.g.*, Thomson-CSF, S.A. v. Am. Arbitration Ass'n, 64 F.3d 773, 776–80 (2nd Cir. 1995) (testing the enforceability of an arbitration agreement against a non-signatory on these grounds, and emphasizing that estoppel generally applies only to bind signatories because they have agreed to arbitrate with someone).

[298] Marcinko v. Palm Harbor Homes, Inc., No. 01CA677, 2002 WL 1438658, at *3–5 (Ohio Ct. App. June 21, 2002).

[299] *Id.* at *5.

the MH purchase agreement incorporated the arbitration provision.[300] Accordingly, the purchase agreement promises would have provided adequate consideration for the arbitration provision.[301]

The judicial trend favors enforcing these form arbitration agreements in MH consumer contracts.[302] Many courts uphold one-sided form provisions, such as Conseco's discussed above, and seem to treat these provisions as accepted MH practice.[303] Still, insiders cannot rely on this trend because courts' applications of contract defenses remain uncertain.[304] In the end, no one is content.

## V. POSSIBLE HUD ACTIONS TO ADDRESS ARBITRATION OF MH CONSUMER CLAIMS

Consumers struggle to obtain remedies for MH defects due to onerous arbitration provisions and MH insiders' blame game avoidance strategy. In

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[300] *Id.* at *3–4.

[301] *See, e.g.*, DRAHOZAL, *supra* note 219, at 103–06 (discussing the lack of consideration defense to arbitration agreements).

[302] *Id.*; *see also* Conseco Fin. Servicing Corp. v. Wilder, 47 S.W.3d 335, 341–44 (Ky. Ct. App. 2001) (denying consumers' claim that arbitration agreement in MH sales and financing contract was unconscionable where the lender's form allowed lender to litigate collection and foreclosure suits, and presented arbitration costs that arguably would hinder consumers' vindication of Consumer Protection Act rights); *In re* Firstmerit Bank, N.A., 52 S.W.3d 749, 756–58 (Tex. 2001) (denying claims by MH buyers and donees that arbitration agreement in MH financing contract was unconscionable where the agreement permitted the lender to seek judicial relief to enforce its security interest and required consumer filing fees of at least $2,000, $250/day/party hearing fee, and other arbitrator and hearing fees).

[303] *See supra* notes 6, 135, 146 and accompanying text (discussing Conseco or Green Tree Financing form arbitration clause included in many MH contracts); *see also Wilder*, 47 S.W.3d at 342–43 (emphasizing that courts have accepted the Conseco or Green Tree Financing form and almost uniformly reject challenges to the clause). Indeed, these form provisions become a sort of private law.

[304] *See* Anderson v. Ashby, 873 So. 2d 168, 184 (Ala. 2003) (per curiam) (finding arbitration clause in note and security agreement unconscionable, albeit in conjunction with credit-life insurance transaction and not MH case); Williams v. Aetna Fin. Co., 700 N.E.2d 859, 866–67 (Ohio 1998) (holding arbitration provision in home equity contract unconscionable where provision in form contract permitted lender to litigate foreclosure and collection actions, and required its targeted low-income consumers to prepay substantial fees as a condition precedent to arbitration); Arnold v. United Cos. Lending Corp., 511 S.E.2d 854, 859–62 (W. Va. 1998) (holding arbitration provision in consumer loan contract unconscionable where form provision allowed lender to seek foreclosure and collection actions in court).

2000, the MHIA directed HUD to develop a program for improving MH consumers' access to remedies. HUD is currently gathering input regarding how the program should be structured, policed, and financed, who should be permitted to lodge complaints and participate, what type of claims should be subject to the program, and what involvement HUD should have in facilitating the program.[305] HUD questions what type of dispute resolution process it should employ, whether that process should be final, what evidentiary and procedural rules should apply, who should serve as decisionmakers, how those decisionmakers should be chosen and trained, and what authority they should have in ordering corrective action.[306] In the absence of clear Congressional direction, it also is unclear whether mandatory enforcement of arbitration clauses under the FAA would trump HUD's program.

Nonetheless, it is time for policymakers to act with respect to MH dispute resolution. This may be under the MHIA or pursuant to additional Congressional direction. Some ideas include: (1) Do nothing and maintain the status quo; (2) enact federal law barring enforcement of all pre-dispute agreements to arbitrate MH warranty disputes; (3) create a federal- or state-controlled mandatory dispute resolution program that MH consumers must pursue prior to litigation; or (4) establish federal- or state-regulated fairness rules for any contractual arbitration of MH warranty disputes. This Article presents some positive and negative aspects of these options. The Article does not fully explore all relevant aspects, but seeks to at least spark discussion and development of a MH dispute resolution program. At a minimum, any program should address the blame game among insiders that gave rise to the MHIA.[307] The program also should provide fair and efficient procedures that protect MH industry cost-savings while promoting consumers' warranty rights. With this in mind, this Article proposes mandatory minimum fairness standards for contractual arbitration of MH disputes. Ideas with respect to such standards are set forth in Part VI.

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[305] *See* HUD Notice, *supra* note 16, at 11,453–54 (asking also what time limits should be imposed, whether there should be an appellate process, and what corrective actions should be required).

[306] *Id.* at 11,452–54. HUD's notice came nearly 27 months after Congress enacted the MHIA. Indeed, it is entirely unclear what HUD will do by 2005, and no public comments had been published as of the time of this Article's completion.

[307] *Supra* note 46 and accompanying text (discussing the MHIA's quest to cure this blame game).

### A. *Do Nothing*

There are legitimate reasons to do nothing with respect to MH arbitration contracts. The MHIA currently calls on HUD to oversee the states' development of programs aimed to resolve disputes among MH manufacturers, dealers, and installers regarding responsibility for repair of defects reported within one year of a MH's installation.[308] The MHIA does not expressly empower HUD to regulate private arbitration agreements. Accordingly, it seems that such regulation would conflict with the FAA's mandate that courts enforce arbitration agreements according to their terms.[309] The current MHIA, therefore, does not affect MH insiders' mass use of arbitration clauses.[310]

Recent HUD actions also indicate its reluctance to regulate private contracts. On July 25, 2003, HUD rejected a proposal by the Manufactured Housing Consensus Committee (MHCC) to broaden HUD's rules for governing MH insiders' handling of consumer disputes and remedial actions.[311] Federal policymakers established the MHCC under the MHCSSA to recommend MH safety and construction standards, as well as procedures for their enforcement.[312] HUD rejected MHCC's recent proposal, however, to prevent expansion of HUD's and MH insiders' responsibility with respect to remediation of MH defects.[313] HUD feared the proposal's defect notice and remediation requirements would "interfere in matters that are traditionally settled through private contracts."[314] HUD further opined that

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[308] *See supra* notes 45–49 and accompanying text (discussing the MHIA).

[309] *See supra* notes 135, 140–41, 195 and accompanying text (discussing FAA preemption).

[310] *See supra* notes 134, 137–38 and accompanying text (discussing the prevalence of arbitration clauses that benefit manufacturers and lenders).

[311] Manufactured Housing Consensus Committee—Rejection of Consumer Complaint Handling Proposal; Correction, 68 Fed. Reg. 47,881, 47,881 (proposed Aug. 12, 2003) (correcting previously published incomplete form of 24 C.F.R. pt. 3282 by restating July 25, 2003 rejection) [hereinafter Rejection].

[312] *Id.*

[313] *Id.* HUD emphasized that the proposal was "inconsistent with the authority granted to the MHCC," and imposed duties on parties who Congress did not intend to reach, such as "retailers, distributors, transporters, and landscapers." *Id.*

[314] *Id.* at 47,882. MHCC's proposal would not have limited consumers' rights under contract and other law. *Id.* However, it required State Administrative Agencies (SAA) to forward complaints regarding serious MH defects to responsible parties, monitor correction of these defects with respect to "design, construction, assembly, modification, addition, or alteration of, or to, [MHs]," and ensure that these corrections are made within

the MHIA directed establishment of a dispute resolution program in lieu of creating statutory MH warranties.[315] Nonetheless, HUD's creation of arbitration fairness regulations would comport with HUD's preference for programs that impose limited administrative burdens on government agencies.[316]

That said, contractual liberty and efficiency generally frown on paternalistic intervention in private transactions.[317] Even seemingly pro-consumer regulations sometimes prove harmful to the public by suppressing competition, causing prices to increase, and/or causing product quality to decrease.[318] Legislative regulation of MH dispute resolution may hinder efficiencies leading to cost-savings, which make MHs a viable housing option for low-income families.[319] Furthermore, contract defenses, such as unconscionability and fraud, theoretically protect consumers from particularly arduous arbitration provisions. Arbitration on fair terms often is a more viable avenue than litigation for consumers to obtain warranty remedies.[320]

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strict time limits. *Id.* at 47,884. The proposal also would have required responsible parties to reimburse MH owners for their corrections of MH defects, or to replace or refund the purchase price of defective MHs under certain circumstances. *Id.*

[315] *Id.* at 47,882. HUD also concluded, without explanation, that the proposal was "not in agreement with [MHIA's dispute resolution process] because the proposal: adds potentially responsible parties (*e.g.*, landscapers, contractors, product suppliers); creates time limits that are inconsistent with section 623; and fails to provide for a forum in which the disputes are to be resolved." *Id.*

[316] *Id.* at 47,881–82 (indicating HUD's objection to the proposal's requirement that HUD and SAAs act as "initial arbiters" in forwarding consumer complaints to responsible parties and ensuring corrections of MH defects because it would add to public administrative burdens).

[317] *See supra* note 187 (discussing the efficiency benefits of properly exercised contractual liberty).

[318] *See, e.g.*, David H. Smith, *Consumer Protection or Veiled Protectionism? An Overview of Recent Challenges to State Restrictions on E-Commerce*, 15 LOY. CONSUMER L. REV. 359, 361–75 (2003) (discussing various state regulations of on-line consumer sales and proposing that although these regulations appear to protect consumers, they result in "harmful lack of competition" that "clearly outweighs the perceived benefits of such legislation").

[319] *See, e.g.*, *id.* at 359–60.

[320] *See, e.g.*, Samuel Estreicher & Matt Ballard, *Affordable Justice Through Arbitration: A Critique of Public Citizen's Jeremaiad on the "Costs of Arbitration,"* DISP. RESOL. J., Nov. 2002–Jan. 2003, at 8, 10–14 (proposing that arbitration *per se* does not deprive employees and consumers of opportunity to vindicate their claims, but instead "may well be the only forum in which they can obtain a hearing"); Scott E. Mollen, *Alternate Dispute Resolution of Condominium and Cooperative Conflicts*, 73 ST. JOHN'S

The problem remains that contract defenses have neither effectively nor efficiently policed the fairness of arbitration agreements. MH consumers generally lack power to prevent insiders' imposition of arbitration provisions that defy common notions of fairness.[321] Courts do not consistently apply contract defenses to ensure the consensual nature or fairness of MH and other consumer arbitration provisions. Furthermore, rampant challenges of MH arbitration provisions, and consequent uncertainties regarding enforcement of these provisions, diminish the efficiency benefits that insiders and consumers arguably gain from arbitration programs.[322] This is especially true in states such as Alabama where courts are particularly embattled regarding MH arbitration.[323]

In addition, MH consumer transactions involve a unique confluence of factors apart from the usual consumer considerations.[324] MHs seem like realty, but the law treats them like personalty. The law also fails to recognize the socio-economic, political, and transactional burdens on MH consumers.[325] Arbitration of MH warranty disputes augments these disadvantages when insiders impose anti-consumer procedures. The challenge is to determine what arbitration procedures are fair for resolution of these MH disputes. Furthermore, policymakers must determine who should be responsible for establishing and enforcing any fairness rules, and how responsible parties should accomplish these tasks.

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L. REV. 75, 86–91 (1999) (discussing the inadequacies of the judicial system for resolving co-op and condominium housing disputes). *But see* Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 720 & n.195, 721 (providing empirical evidence regarding arbitration clauses in franchise agreements but noting the limited empirical studies of "the use and nature of arbitration clauses" in other contexts).

[321] Reasonable people certainly can disagree regarding what is "fair." It seems, however, that MH form arbitration provisions that include a full arsenal of pro-insider provisions are particularly onerous for consumers. *See supra* Part III.A (discussing insiders' form arbitration provisions that allow only insiders to choose arbitrators and seek remedies in court, and deny consumers' rights to class relief and attorney fees).

[322] *See supra* Part IV (discussing the influx of consumer challenges to arbitration and the contradictory and confusing opinions that have resulted from these challenges).

[323] Garrett S. Taylor, Note, *Read the Fine Print—Alabama Supreme Court Rules that Binding Arbitration Provisions in Written Warranties are Okay*, 2001 J. DISP. RESOL. 165, 172–75 (discussing Alabama courts' flip-flop on the enforceability of binding arbitration of MMWA claims).

[324] *See supra* Part II (discussing factors affecting MH consumer sales).

[325] Wilden, *supra* note 111, at 526 (noting the need for "[u]pgrading the regulatory system" to help MHs reach their full potential, and lamenting how HUD's current regulatory scheme "is seriously deficient in providing consumer protection").

## B. *Legislative Ban on MH Arbitration Agreements*

Assuming policymakers decide to regulate MH dispute resolution, what type of regulation is appropriate? Such regulation should protect consumers' access to warranty remedies and procedural justice. A particularly proactive option would be for Congress to ban pre-dispute arbitration clauses in MH consumer contracts. Some in Congress have proposed legislation barring such clauses in all consumer transactions.[326] Opponents of consumer arbitration argue pre-dispute arbitration clauses unduly harm consumers' access to fair dispute resolution and vindication of warranty rights.[327] Indeed, this may be true with respect to arbitration provisions MH insiders bury in form agreements and offer to consumers as a condition to purchasing a home.[328] MH insiders may use form arbitration provisions to the disadvantage of consumers, especially when these consumers lack counsel and educational resources available to conventional homebuyers.[329] Policymakers, therefore, may wish to bar compulsory arbitration of MH warranty claims to protect consumers from unwittingly forfeiting their access to defect remedies.[330]

Nonetheless, standard form contracts can promote efficiency. Companies' use of form agreements for regularly occurring transactions may substantially reduce their costs.[331] Consumers benefit when companies pass

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[326] *See, e.g.*, Consumer Credit Fair Dispute Resolution Act of 2001, S. 192, 197th Cong. § 2 (2001) (unsuccessful bill that sought to bar enforcement of pre-dispute agreements to arbitrate consumer credit claims); Justin Kelly, *Feingold Bill Would Bar Pre-Dispute Arbitration in Employment Claims*, Jan. 31, 2001, *at* http://www.ADRWorld.com (last visited Oct. 4, 2004) (discussing bill invalidating pre-dispute arbitration agreements covering certain employment discrimination claims); *see also* 15 U.S.C. § 1226 (2000) (limiting enforcement of agreements to arbitrate motor vehicle franchise disputes to post-dispute written contracts, and requiring written explanations for any arbitration awards).

[327] *See, e.g.*, Cole, *supra* note 2, at 462–67 (suggesting that only disputes between parties with similar negotiating incentives should be subject to arbitration).

[328] *See supra* Part III.A (discussing one-sided arbitration provisions).

[329] *See supra* notes 126–31 and accompanying text (discussing the lack of MH buying education).

[330] *See supra* Part II.A.2 (emphasizing the policy protecting MH safety); *see also* Barnes v. McKellar, 644 A.2d 770, 772–73 (Pa. 1994) (holding an arbitration award on a real estate vendor's claims was void under a Pennsylvania statute barring compulsory arbitration involving title to real property).

[331] *See* Morant, *supra* note 191, at 262–65 ("Because the form includes most, if not all, of the terms and conditions for the bargain, use of the form substantially reduces transactional costs associated with contract formation.").

these savings on through lower prices and interest rates, or other consumer benefits.[332] Although it is questionable whether consumers in fact enjoy these cost savings, it may go too far to ban all pre-dispute arbitration clauses in MH contracts.[333] Arbitration may benefit consumers who cannot afford litigation, and therefore would likely have no opportunity to air their concerns in court.[334] Consumers also may be more successful on typical claims in arbitration than in court.[335] Accordingly, policymakers must approach regulation of arbitration agreements carefully.[336]

On balance, the best option for protecting MH consumers' warranty remedies likely is not complete prohibition of MH arbitration agreements.[337] In addition, a ban limited to pre-dispute agreements would effectively abolish MH arbitration because MH manufacturers and lenders rarely would agree to arbitrate after disputes arise.[338] Most companies include pre-dispute

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[332] Ware, *supra* note 143, at 211–13 (suggesting how companies pass dispute resolution cost savings on to consumers). *But see* Sternlight, *supra* note 142, at 686–93 (questioning whether consumers benefit from companies' dispute resolution cost savings).

[333] Sternlight, *supra* note 142, at 686–93; *see also* Morant, *supra* note 191, at 262–67 (discussing the use of standard agreements to prejudice weaker bargaining parties).

[334] *See* Theodore O. Rogers, Jr., *The Procedural Differences Between Litigation in Court and Arbitration: Who Benefits?*, 16 OHIO ST. J. ON DISP. RESOL. 633, 640–41 (2001) (comparing the costs and benefits of arbitration and litigation in employment cases, and concluding there are "real advantages for employees in the arbitration process" and employers may opt for arbitration because it offers more certainty).

[335] *See* Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 46 (1998) (finding that, on the whole, employees did better in arbitration than in litigation on their claims against employers).

[336] *See* Morant, *supra* note 191, at 256–61 (noting the pitfalls and limitations of "paternalistic intervention" if employed by courts and legislators in contract enforcement).

[337] *See* Drahozal & Hylton, *supra* note 168, at 582 (warning that laws making arbitration "less attractive" may "not only raise the costs of dispute resolution, but they also reduce the governance benefits associated with a contract" such as "quality of output" and "level of effort").

[338] *See* Lewis L. Maltby, *Out of the Frying Pan, Into the Fire: The Feasibility of Post-Dispute Employment Arbitration Agreements*, 30 WM. MITCHELL L. REV. 313, 314–30 (2003) (finding in a recent study of employment arbitration that legislation barring pre-dispute arbitration agreements would prevent employment disputes from ever being arbitrated and would deny most employees the opportunity to pursue claims against employers due to high incidence of summary judgment, lack of access to representation in small dollar claims, and high costs and delays of litigation). Interestingly, aversion to post-dispute arbitration agreements arises not only in uneven bargaining contexts, but also in business to business disputes. Professor Maltby found in a study of all 2001

arbitration clauses in form agreements to avoid the risks of a few high-cost/bad-publicity cases in which consumers likely would reject post-dispute arbitration agreements.[339] MH companies generally are not eager to arbitrate, however, after they become vested in their positions on the merits of a case.[340] Moreover, these companies generally prefer to litigate claims they can quickly squelch through summary judgment.

Ideally, contract law would adequately protect MH consumers from unjust arbitration provisions.[341] Courts' current application of contract defenses, however, has not done the job.[342] Nonetheless, it seems an all-or-nothing approach is not the answer. We cannot afford to do nothing in light of current threats to MH safety and inefficient uncertainty of MH arbitration enforcement. We should also not hastily ban all pre-dispute arbitration agreements to the detriment of procedural and product cost-savings.[343]

### C. *Mandatory Federal or State Dispute Resolution Program as a Precondition to MH Litigation*

The MHIA or other federal law could delegate the power to HUD or the FTC to establish and implement a dispute resolution program as a precondition to filing MH warranty claims in court. It currently appears that HUD will focus the MHIA program on intra-industry disputes among

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business dispute cases filed by the AAA's Somerville, New Jersey office, that post-dispute agreements were used in only 7 of the 78 cases (9%). *Id.* at 322.

[339] *See id.* at 314–21 (explaining that, in the employment context, corporate counsel are generally risk averse, and are more likely to agree to pre-dispute arbitration because they do not know the extent of any liability they may face in a few future disputes; explaining further that once the facts of a dispute are known, there is much less incentive to agree to arbitration, especially when many, if not most, cases can be squelched through summary judgment on weak claims, or low-dollar settlements with employees who cannot fund litigation).

[340] *Id.* at 323–28 (indicating the responses of management attorneys regarding companies' reluctance to arbitrate after they see the risk and possibility of summary judgment in a case).

[341] *See id.* at 329–30 (explaining that the central enforcement question should be whether the parties have consented to an agreement).

[342] *See supra* Part IV.B (discussing the application of contract defenses in MH contexts).

[343] *See* Maltby, *supra* note 338, at 330 (concluding that barring pre-dispute arbitration agreements in employment cases "will not solve the problem," but "would leave the majority of employees who need arbitration in order to obtain justice empty handed").

insiders.[344] It is unclear, however, whether HUD will require participation in a MHIA program as a pre-condition to filing suit. It is also unclear whether HUD will include consumers in such a program.[345]

At this stage, some policymakers have created informal dispute resolution programs. For example, some states have developed various programs for addressing state and federal MH requirements, and for forwarding consumer complaints to responsible manufacturers.[346] The MHIA also has sparked some states to create more formal dispute resolution programs. The Alabama Manufactured Housing Commission (AMHC) is developing a state MHIA mechanism for resolving warranty disputes among MH manufacturers, retailers, and installers.[347]

Statutorily prescribed mandatory arbitration schemes generally are constitutional and enforceable where they allow for some judicial review, and therefore comport with any right to a jury trial with respect to legal remedies.[348] With proper authorization, HUD or the FTC could establish a dispute resolution program that consumers must pursue before filing suit or seeking other means for redressing warranty claims. In this way, a government agency could require all parties involved in a warranty dispute to participate in mediation, arbitration, or some other form of alternative dispute resolution (ADR). In order to have "teeth," such a program would have to be mandatory. In other words, such a program would trump MH insiders' attempts to require that consumers waive access to the program.

Such a mandatory ADR program likely would provide consumers with a means for asserting their warranty claims. Perhaps the program could allow

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[344] *See supra* notes 45–49 and accompanying text (discussing the MHIA).

[345] *See supra* note 46 (discussing HUD's focus).

[346] A representative from HUD's Office of Manufactured Housing Program reported that there are 38 states that have agencies assisting consumers with MH complaints. E-mail from Elsie Draughan, Office of Manufactured Housing Programs, to Emily Lauck, Research Assistant to Associate Professor Amy Schmitz, University of Colorado School of Law (Oct. 14, 2003) (on file with author).

[347] ALA. ADMIN. CODE r. 535-X-18-.04–.07 (2003), pursuant to ALA. CODE § 24-6-4 (1975). Per the regulation, the AMHC determines who is responsible for defects based on "credible source[s]," and orders responsible parties to correct defects within a specified period, "normally twenty (20) days after receipt." ALA. ADMIN. CODE r. 535-X-18-.04–.07 (2003). In addition, the regulation requires the MH owner be contacted to verify repairs have been completed, and allows for a hearing or on-site inspection requested by any affected party within ten days after an adverse notice. *Id.*

[348] *See* Motor Vehicle Mfr. Ass'n of the U.S., Inc. v. New York, 550 N.E.2d 919, 923–26 (N.Y. 1990) (upholding the statutory mandatory arbitration of warranty claims where parties may seek judicial review of any arbitration award to ensure it is supported by adequate evidence).

consumers to assert defect claims before losing their homes in foreclosure actions. A public agency also could craft procedural rules for the ADR program to preserve fair processes for consumers to address warranty disputes.[349] A program of this nature also may provide more public disclosure than private arbitration regarding insiders' MMWA violations.[350] Although an administrative program would stymie judicial rulemaking, it would shed public light on warranty abuses by MH insiders. The degree of publicity, however, would depend on whether the program was confidential or open to the public.

HUD or another federal body could administer the ADR program on a national level. If HUD chose to do so, it would be responsible for establishing program procedures, generating lists of qualified neutrals, and essentially handling a full range of complex administrative details that bodies such as the AAA handle with the aid of considerable financial and human resources. This would be an impossible administrative burden for HUD to shoulder with its current staff and funding.[351] Moreover, it is doubtful that Congress would equip HUD with the resources needed to create the administrative regime necessary for such an ADR program. Congress established HUD "as a program, not a regulatory agency."[352] Some assert that HUD has been unable to even regulate and update the MH code it created under the MHCSSA.[353]

Accordingly, it appears that states would be in a better position than HUD to administer any MH ADR program. Indeed, the MHIA envisions decentralized dispute resolution programs, and state administration of the programs would help alleviate HUD's burdens. Allowing states to administer their own programs in accordance with HUD's guidelines would decrease administrative layers and lessen the drain on federal resources. In addition, state programs could encompass MH installers outside of HUD's regulation and improve accountability for remediation of MH defects.[354] States also could tailor programs to their local MH demographics and experiences. This

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[349] *See supra* Part III.A (discussing insider-imposed arbitration provisions).

[350] *See supra* notes 229–32 and accompanying text (discussing concerns regarding vindication of statutory rights under MMWA).

[351] Wilden, *supra* note 111, at 530–31.

[352] *Id.*

[353] *Id.* at 526–31 (emphasizing how HUD has been unable to regulate the MH code, and how that code has failed to protect consumers); *see also supra* notes 40–43 and accompanying text (discussing HUD's creation of loose federal MH standards).

[354] *See* Wilden, *supra* note 111, at 530–31 (discussing lack of accountability due to HUD's administration of the MH code at the federal level).

would foster federalism and comport with many policymakers' preference for preserving state control over public safety and welfare programs.[355] It also would place administrative burdens on states in accordance with their shares of MH warranty disputes. For example, Alabama would have the opportunity to craft a program to address its significant MH warranty issues, but also would shoulder the burden of administering the program.

HUD or another federal body nonetheless would have the hefty tasks of creating mandatory ADR program guidelines and policing states' compliance with those guidelines. Moreover, states likely would clamor for federal funding to fuel their hands-on administration of these programs. It is doubtful legislators on the federal or state level would eagerly shoulder these financial and administrative burdens. A process of funding "hot-potato" most likely would lead to high costs for participants in these programs. This, in turn, leads to questions regarding consumers' responsibility for ADR fees and costs.[356] Concerns also remain regarding states' vulnerabilities to local insiders' political might.[357] Variations among state programs also may invite forum-shopping by national manufacturers and lenders to the detriment of consumers.

### D. *Mandatory Federal or State Fairness Rules for Contractual Arbitration of MH Warranty Disputes*

It seems government-run ADR programs for MH consumer warranty disputes would not be politically or practically feasible at this time. Accordingly, it may be more feasible for policymakers to encourage MH consumers' use of improved private arbitration to seek warranty remedies.[358] HUD or other policymakers could seek to improve the fairness of MH

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[355] *Id.* at 536 (questioning the survival of HUD, and emphasizing functional and political reasons for transferring responsibility for MH programs to states).

[356] *See supra* notes 155–60 and accompanying text (discussing *Randolph*'s failure to clarify what qualifies arbitration costs as so high that they preclude consumers from vindicating statutory rights); *see also infra* Part VI (discussing possible standards for regulation of costs in private arbitrations).

[357] *See* Smith, *supra* note 318, at 374–75 (discussing how companies with political clout have influenced seemingly pro-consumer regulations of on-line transactions in certain areas, such as liquor sales).

[358] *See generally* Maltby, *supra* note 338, at 330. As Professor Maltby concluded with respect to employment arbitration, "Rather than change from one unacceptable option to another, models for voluntary pre-dispute arbitration agreements need to be further developed." *Id.*

arbitrations by dictating minimum standards for such processes.[359] This is not an entirely novel idea—others have proposed due process standards for binding arbitration of employment and consumer disputes.[360] Due to the statutory policies and uneven bargaining contexts involved, organizations administering ADR have promulgated consensus standards for binding arbitration of these disputes.[361] In Congress, Senator Jeff Sessions introduced such legislation for consumer and employment arbitrations at the end of the 2000 legislative session.[362]

Legislating arbitration fairness standards invokes classic struggles between contractual liberty and procedural fairness. Parties should be free to negotiate arbitration contracts that fit their needs, but equities may dictate limits on that freedom. Accordingly, policymakers should regulate only those standardized form contracts MH insiders offer to consumers without negotiation.[363] Furthermore, they should investigate what arbitration procedures are "fair" before crafting standards that impinge contractual liberty.[364] Standards should respond to the unique relational, contextual, and

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[359] *See id.* (proposing regulation of pre-dispute arbitration agreements as a middle road for ensuring fairness of employment arbitration).

[360] *See, e.g.*, Budnitz, *supra* note 148, at 333–43 (proposing minimum standards for arbitration of consumer claims against financial institutions); Maltby, *supra* note 338, at 328–30 (discussing ways to increase fairness of employment arbitration agreements); Robert Alexander Schwartz, *Can Arbitration Do More for Consumers? The TILA Class Action Reconsidered*, 78 N.Y.U. L. REV. 809, 833–43 (2003) (proposing regulations of consumer arbitration agreements aimed to provide consumers with a "cheap or free" arbitral forum and to protect "the prospect of a fair, impartial decision").

[361] *See* AAA Consumer Rules, *supra* note 155; National Consumer Disputes Advisory Committee, Due Process Protocol for Mediation and Arbitration of Consumer Disputes (1998), *at* http://www.house.gov/judiciary/pet10608.htm [hereinafter Consumer Protocol]; Due Process Protocol for Mediation and Arbitration of Health Care Disputes (1998), *at* http://www.ama-assn.org/ama1/pub/upload/mm/395/healthcare.pdf.

[362] Consumer and Employee Arbitration Bill of Rights, S. 3210, 106th Cong. § 2(c) (2000) (bill to establish due process standards for consumer and employment arbitration).

[363] *See, e.g., id.* § 17(a) (proposing fairness standards applicable only to "standardized form contract[s] between the parties to a consumer transaction").

[364] *See* Robert G. Bone, *Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness*, 83 B.U. L. REV. 485, 493–94 (2003) (critiquing common approaches for analyzing procedural fairness, and proposing "that a convincing fairness analysis requires more than the simple *ex ante* argument and more than the sort of pragmatic value-balancing or crude appeal to intuition that is all too common today"). I admit that this Article's proposal calls on a fair amount of pragmatic value-balancing and more research certainly is necessary to develop fairness standards. This Article, however, seeks to spark awareness of dispute resolution concerns in the unique MH microcosm.

policy factors involved in MH warranty dispute resolution. They should seek both to ensure a level of protection for MH consumers' warranty claims and to clarify for all contracting parties which arbitration provisions are enforceable in MH contracts.

Clarification of adequate procedures could save both insiders and consumers the time and resources they currently devote to litigating these issues. Insiders could better rely on the enforceability of arbitration programs that comply with prescribed standards. This may encourage them to pass related savings on to consumers through improved products and lower prices or interest rates. Consumers would be on notice of the likely futility of attacks on arbitration agreements that comply with the minimum standards. Likewise, all parties would know that agreements failing to meet these standards would be invalid.

Congress could delegate authority to create such arbitration standards either to HUD to preserve the safety and affordability of MHs or to the FTC to protect warranty rights under the MMWA. Congress would have to make any such delegation of authority explicit, however, in order to override the FAA's general arbitration enforcement regime.[365] It seems such standards would further federal policies, as well as the Supreme Court's declaration that contracts are subject to the power of the state to protect public policy, including the promotion of safe housing.[366] In addition, the standards would merely set a floor, allowing parties to contract for procedures that are more protective of consumer claims.

## VI. SUGGESTED MINIMUM FAIRNESS STANDARDS FOR THE ARBITRATION OF MH CONSUMER CLAIMS

Any legislated arbitration standards should apply only to non-negotiable MH agreements, and should not overly impede efficiency or contractual liberty. Policymakers, MH insiders, and consumers should debate the precise contours of any mandatory minimum fairness standards for MH arbitration agreements. This Article suggests some guidelines, and invites all involved to explore these and other ideas in order to create standards for efficient and procedurally fair MH arbitrations. Of course, there are positive and negative

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[365] *See supra* notes 203–14 and accompanying text (discussing the courts' struggles with whether the MMWA clearly overrides the FAA and precludes binding arbitration).

[366] *See* Marcus Brown Holding Co., Inc. v. Feldman, 256 U.S. 170, 197–98 (1921) (holding law requiring reasonable rents and limiting landlords' rights to maintain actions to recover possession of rented housing was justified in light of a policy protecting shelter, and therefore did not improperly impair landlords' contract rights).

aspects to each suggested standard, and no set of standards will be a panacea. However, discussion of these positive and negative aspects is important both in MH cases and in other uneven bargaining contexts.[367]

## A. *State-Tailored Standards Aimed at Local Concerns*

### 1. *Protections Responsive to State Concerns*

One option is for HUD to dictate broad goals or requirements for the regulation of MH arbitration agreements, but require states to determine and implement their own precise standards. State policymakers are better suited than HUD regulators to determine dispute resolution standards that comport with local MH concerns and demographics. For example, policymakers in Florida and Arizona may wish to craft rules applicable to their divergent MH communities. They could devise regulations that account for differences between purchases of high-end MHs used as vacation getaways and purchases of lower-end MHs which consumers rely on as their only shelters.[368]

HUD's broad guidelines could allow states with particularly rampant MH warranty problems to require stricter standards. In addition, some states simply have more MHs, more MH consumer sales, and more consumer challenges of MH arbitration agreements. For example, Alabama may wish to provide more specific standards for MH dispute resolution in order to quell its current flood of MH warranty litigation.[369]

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[367] Such legislative fairness standards have been introduced in Congress, but they have sparked little debate or action. *See supra* note 362 (noting the bill referred to the Senate Committee on the Judiciary in 2000).

[368] Regardless of minimum standards, contract law still would apply. These standards, however, would ease uncertainties and prevent the need to litigate issues like unconscionability. *See* Izzi v. Mesquite Country Club, 186 Cal. App. 3d 1309, 1318 (Cal. Ct. App. 1986) (denying unconscionability challenge of arbitration contract where challengers failed to show it was a take-it-or-leave-it contract), *superseded by statute as stated in* Villa Milano Homeowners Ass'n v. Il. Davorge, 84 Cal. App. 4th 819, 830 (Cal. Ct. App. 2000) (applying new state statute permitting purchaser to bring construction claims in court despite an arbitration clause in a real estate purchase agreement, but not affecting unconscionability analysis in *Izzi*).

[369] *See supra* note 323 (referencing haphazard MH challenges in Alabama).

### 2. *HUD Oversight of Minimal Uniformity*

States may not go too far in restricting the enforceability of arbitration agreements. The FAA preempts state regulations that overly restrict the enforceability of arbitration beyond Congress's delegations to HUD and the FTC. That said, Congress could authorize HUD or the FTC to gather interested parties and develop uniform standards pursuant to their research and input. Federal direction of standards would prevent forum-shopping and jurisdictional battles that could result from divergent state standards.

Regardless of whether federal or state policymakers create arbitration standards, states should implement and enforce the standards. A federal agency should not shoulder the administrative burden of policing these contracts. Enforcement of these contract regulations, however, would not be as burdensome as administering ADR programs. Courts would enforce the regulations by invalidating agreements that violate them. In addition, parties would retain rights to raise contract challenges to invalidate agreements that pass minimum standards. The standards would promote certainty and reliance on compliant arbitration provisions, however, by limiting successful challenges and courts' varied and ambiguous applications of contract defenses to MH arbitration agreements.

## B. *Procedures Geared To Promote Efficient Arbitration and Contain Delays and Costs*

Regulations of arbitration agreements should not drive insiders to end their consumer arbitration programs. Although some consumers always prefer litigation over arbitration, others would mourn the loss of an arbitration option. Companies' elimination of their arbitration programs also could drive increases in consumer prices and decreases in product quality. Accordingly, any regulations should balance consumers' and insiders' concerns.

### 1. *Finality Coupled with Time Limits to Promote Efficiency*

Final and time-limited arbitration of MH disputes would benefit insiders, consumers, and courts. Any MH arbitration standards, therefore, should set reasonable time limits on arbitration proceedings and ensure their finality. These time limits should not impede parties' opportunities to present their cases. However, parties should not be able to use delays and postponements to harass opponents and frustrate arbitration's efficiency.

Currently, FAA arbitration awards are final and subject to very limited judicial review focused on ensuring minimal procedural fairness.[370] Courts could apply this same FAA limited review to MH arbitration awards. As an alternative, federal law could prescribe slightly broader review by allowing courts to review awards for legal errors. The Supreme Court condoned arbitration of statutory claims on the assumption that judicial review of awards would be sufficient to ensure arbitrators' proper application of these statutes.[371] In reality, however, courts' limited and deferential review of awards under the FAA often defies this assumption.[372] Review of legal error may help cure this disjoint to ensure that arbitrators properly apply MH safety and warranty laws.

Any expansion of FAA judicial review, however, comes with uncertainties and drawbacks. It is unclear whether legal error review would help consumers. It may saddle consumers with undue costs of preserving a record.[373] In addition, companies may use such review to overwhelm consumers with post-arbitration litigation, or to squelch pro-consumer awards based more on facts and equities than strict application of legal rules.[374] Furthermore, there is some debate about whether expanded review of arbitration would unduly frustrate FAA policy and the finality of arbitration.[375] Indeed, these concerns have led to courts' current disagreement regarding the enforceability of arbitration agreements calling for expanded judicial review.

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[370] 9 U.S.C. § 10 (2003).

[371] *See, e.g.*, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (consigning ADEA claims to arbitration on the assumption that employees will be able to vindicate their ADEA rights in arbitration).

[372] *See* Thomas J. Stipanowich, *Contract and Conflict Management*, 2001 WIS. L. REV. 831, 910, 914–15 (noting that, in reality, judicial review under the FAA does not ensure arbitrators comply with statutes).

[373] *See* Lapine Technology Corp. v. Kyocera Corp., Nos. C-87-20316 WAI, C-91-20159 WAI, 2000 WL 765556, at *3 (N.D. Cal. Apr. 4, 2000) (evidencing burdens of review on courts and parties due to added litigation and need for the requisite arbitration record).

[374] *See, e.g.*, Harris v. Parker Coll. of Chiropractic, 286 F.3d 790, 794 (5th Cir. 2002) (enforcing an expanded review agreement at the insistence of an employer challenging an arbitration award in favor of an employee on her hostile work environment and retaliation claims); Bowen v. Amoco Pipeline Co., 254 F.3d 925, 933–36 (10th Cir. 2001) (involving Amoco's attempt to enforce an expanded review agreement to challenge an arbitration award for the landowners).

[375] *See Bowen*, 254 F.3d at 936 (holding an expanded review provision unenforceable under the FAA).

### 2. *Liberal Joinder to Aid Efficiency and End the Blame Game*

MH arbitration standards should allow for liberal joinder of all parties involved in selling, manufacturing, installing, and financing a defective MH. Allowance for joinder would comport with the MHIA's goal of ending the blame game among MH manufacturers, retailers, and installers, which has hindered consumers' access to warranty remedies.[376] Furthermore, arbitration agreements' hindrance of joinder breeds parallel proceedings that burden consumers, companies, and courts.

Currently, most courts will not consolidate arbitration proceedings unless the agreements at issue expressly permit it.[377] Courts reason that parties who contractually agree to arbitrate with named parties do not necessarily consent to arbitrate as a group in one forum. Furthermore, courts will not order third parties to an agreement to join arbitration without their consent. Parties who have not contracted to arbitrate generally are free to litigate unless a court can bind them to an arbitration agreement under estoppel, agency, incorporation, alter ego, or another theory for binding a nonsignatory to a contract.[378]

In MH cases, however, the importance of having warranty disputes resolved in one forum justifies consolidation. It also supports joinder of third parties with a significant stake in a MH warranty arbitration. Courts' refusal to order consolidation or joinder frustrates the fair and efficient resolution of MH defect claims implicating various responsible parties. Expensive and time-consuming parallel proceedings create risks of undue liability and frustrate courts' and arbitrators' determinations of liability issues.[379] Liberal consolidation or joinder would therefore aid consumers in holding all responsible parties accountable for their contributions to the MH defects.

At a minimum, these concerns justify joinder of parties who have consented to arbitrate, albeit by separate arbitration contracts. The more difficult questions arise with respect to joining parties to arbitration who have not agreed to arbitrate at all. In such cases, it may be appropriate to allow all parties to resolve warranty issues in litigation. This raises questions,

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[376] *See supra* note 46 and accompanying text (discussing the MHIA's goals with respect to dispute resolution).

[377] *See supra* notes 161–65 and accompanying text (discussing courts' reluctance to consolidate arbitrations).

[378] *See supra* note 297 (noting how courts bind non-signatories to arbitration agreements in some MH cases).

[379] *See supra* note 72 and accompanying text (discussing significant defects caused by faulty installation).

however, regarding the propriety of preventing parties' enforcement of contract rights.

As a less aggressive alternative, the standards could allow courts to stay litigation related to an ongoing MH warranty arbitration. This has significant drawbacks. It stymies non-parties' access to judicial remedies and creates significant risks that factual findings in the arbitration may bind non-arbitrating parties. In addition, this may perpetuate the blame game by encouraging arbitrating parties to blame non-parties to the litigation and vice versa. Nonetheless, some non-parties may join warranty arbitrations in order to protect their positions with respect to key factual issues regarding MH defect responsibility. Again, these are suggestions for policymakers to consider and debate.

### 3. *Limited and Streamlined Discovery and Evidentiary Rules Aimed to Further Efficiency*

Some commentators support broad discovery and strict application of evidentiary rules in consumer and employment arbitrations to protect parties' procedural rights and vindication of statutory claims.[380] Some courts also have refused to enforce arbitration agreements in uneven bargaining contexts due to concerns about insufficient discovery.[381] One court indicated, for example, that arbitration as a condition of employment must provide for "more than minimal discovery" in order to protect employees' vindication of statutory rights.[382]

Added discovery and evidentiary rules, however, often judicialize arbitration by transforming it into private litigation.[383] This undermines the

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[380] *See* Budnitz, *supra* note 148, at 311–12 (opining that "arbitration's restrictions on discovery may make it impossible for consumers to prepare their case" because consumers often need documents in the corporation's control); Sternlight, *supra* note 142, at 683–84 (discussing how corporate defendants can decrease consumers' claims by using arbitration to prevent consumers from getting the discovery they need, and noting that "even a seemingly neutral restriction on discovery will affect consumers adversely").

[381] *See, e.g.*, Hooters of Am., Inc. v. Phillips, 39 F. Supp. 2d 582, 614–15 (D.S.C. 1998) (holding arbitration clause unconscionable where the employer had control over arbitrator selection and employee had very limited discovery), *aff'd on other grounds*, 173 F.3d 933, 940 (4th Cir. 1999) (holding employer breached employment agreement by establishing biased arbitration rules).

[382] Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1482 (D.C. Cir. 1997).

[383] *See, e.g.*, Ware, *supra* note 171, at 93–97 (discussing the judicialization of arbitration); Kirby Behre, *Arbitration: A Permissible or Desirable Method for Resolving*

efficiency benefits of arbitration.[384] Furthermore, even some scholars who oppose arbitration of consumer disputes nonetheless recognize that judicialization of arbitration may be particularly detrimental to consumers.[385] Many consumers, more so than companies, lack the financial resources to fund expenses of trial-like arbitration procedures.[386] In addition, even if there are cases in which individual consumers benefit from such procedures, judicialized arbitration may harm consumers as a whole by increasing prices and interest rates.[387]

Nonetheless, employees and consumers often do not have access to the information that they need to present their cases. This is especially true for MH consumers who lack access to information and evidence relative to the manufacturing and installation of MHs. Accordingly, MH arbitration standards should ensure consumers' access to necessary information.[388] It may be wise for standards to specify that parties involved must exchange all relevant information in good faith. The rules also could allow arbitrators to impose stiff sanctions for any party's failure to do so. The information exchange, however, need not be formal, and should comport with the expedited nature of arbitration.[389]

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*Disputes Involving Federal Acquisition and Assistance Contracts?*, 16 PUB. CONT. L.J. 66, 88–89 (1986) (same).

[384] *See* Ware, *supra* note 171, at 93 (emphasizing the drawbacks of judicialization of arbitration proceedings); Behre, *supra* note 384, at 88 (noting that the cost savings of arbitration "is negated if the parties to an arbitration demand judicialization").

[385] Moohr, *supra* note 171, at 1092–98 (discussing unfairness of arbitration in traditionally non-merchant contexts and noting how judicialization of arbitration results in "expensive hybrid" ADR that may be too burdensome for non-commercial disputants).

[386] *See id.* at 1093; *see also* Michael Heise, *Justice Delayed?: An Empirical Analysis of Civil Case Disposition Time*, 50 CASE W. RES. L. REV. 813, 843 (2000). Generally, non-individuals, especially corporate parties, enjoy greater access than individuals to economic resources necessary to litigate "with more vigor and for a longer period of time." *Id.* A 1992 U.S. Dept. of Justice, Bureau of Justice Statistics survey of state courts indicated that involvement of non-individual defendants in litigation generally resulted in longer trials. *Id.* at 842–44.

[387] *See* Ware, *supra* note 171, at 89–93 (noting how judicialization of proceedings often results in increased business costs that are passed on to the populace through higher prices).

[388] *See* Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1482–83 (D.C. Cir. 1997) (noting the importance of sufficient discovery in employment cases).

[389] Senator Sessions' proposed standards, for example, require parties to employment and consumer arbitrations to "grant access to all information reasonably relevant to the dispute" and allow for depositions to the extent "consistent with the

The rules also could specify that parties may hold back only those documents and communications protected by important policy-driven rules such as attorney-client or other privileges.[390] Safeguards may also be necessary to prevent revelation of embarrassing or particularly prejudicial evidence. One idea is to require that parties specify during the exchange of documents what they believe is protected. Arbitrators could then determine objections prior to the arbitration proceedings to expedite hearings. Mandatory regulations should not undermine arbitration's equity and efficiency goals by requiring strict application of evidence rules in the proceedings.

### C. *Additional Protections for Consumers' Access to Warranty Remedies*

In balancing efficiency and fairness concerns, policymakers may also consider requiring additional standards particularly geared to protecting MH consumers' access to warranty remedies. Although these protections may be unpopular with MH insiders, they may be appropriate in order to account for unique factors affecting MH transactions, and to promote safe and affordable MHs as an important source of low-income housing.[391] Some arbitration provisions that may deserve special regulation include those covering disclosure, proceeding costs, arbitrator selection, proceeding location, class relief, and access to remedies provided by statute. Of course, this list is by no means exhaustive. Policymakers should consider the positive and negative aspects of these and other provisions.

#### 1. *Disclosure of Arbitration Clauses in Consumer Contracts*

Federal arbitration law does not require special disclosure or notice of arbitration provisions. Instead, it directs courts to enforce arbitration agreements like any other contracts.[392] The Supreme Court held that the FAA

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expedited nature of arbitration." Consumer and Employee Arbitration Bill of Rights, S. 3210, 106th Cong. § 2(c)(5)(A), (B) (2000).

[390] *See id.* (providing that access to information should be "subject to any applicable privilege or other limitation on discovery").

[391] *See supra* Part II.B (discussing various factors affecting MH transactions).

[392] *See* Volt Info. Scis. v. Bd. of Trs., 489 U.S. 468, 478–79 (1989) (stating that the FAA's purpose is to ensure that "private arbitration agreements are enforced").

preempts state law requiring special arbitration notice or disclosure.[393] Congress, therefore, would have to condone any special notice provisions.

Such contract regulation, however, may be appropriate in the MH consumer context. Consumers often purchase MHs in high-pressure transactions.[394] They often do not read, let alone understand, related contracts. This is especially true regarding arbitration clauses with complicated carve-outs and one-sided procedures that may negatively impact warranty rights. In addition, MH consumers are generally not beneficiaries of homebuyer education and counseling.[395] Accordingly, policymakers should seriously consider notice requirements for form arbitration clauses in MH contracts. Disclosure rules also could provide consumers with information regarding MH-buying resources.[396]

### 2. *Balanced Arbitrator Selections*

Pro-insider arbitrator selection provisions in MH arbitration clauses raise red flags for courts and policymakers. Some courts have invalidated arbitration agreements that give companies sole power to choose arbitrators.[397] Some policymakers have proposed regulations for ensuring competence and neutrality of arbitrators, especially in light of concerns regarding repeat-player advantages.[398] Nonetheless, many courts enforce agreements allowing insiders to choose the arbitrator with the consumer's

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[393] *See* Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 688–89 (1996) (holding that the FAA preempted state law requiring special disclosure of arbitration clauses).

[394] *See supra* Part II.B.2.b (describing a high-pressure context).

[395] *See supra* Part II.B.2.c (discussing the lack of MH buyer education).

[396] *See, e.g.*, Consumer and Employee Arbitration Bill of Rights, S. 3210, 106th Cong. § 2(b) (2000) (requiring special notice of an arbitration clause in form employment and consumer agreements, as well as identification of sources to contact for further information).

[397] *See, e.g.*, Cheng-Canindin v. Renaissance Hotel Assocs., 57 Cal. Rptr. 2d 867, 874–77 (Cal. Ct. App. 1996) (finding employer's dispute resolution procedure so one-sided that it did not qualify as "arbitration" enforceable under the FAA); *see also supra* notes 246–49 and accompanying text (discussing unconscionability arguments based on one-sided selection).

[398] *See* S. 3210 § 2(c)(1)(A), (B) (emphasizing that parties should have a right to "a competent, neutral arbitrator," and an "equal voice" in arbitrator selection); *see also supra* note 175 and accompanying text (discussing repeat player concerns).

consent,[399] and policymakers have not enacted regulations requiring that consumers have an active and equal voice in choosing arbitrators.[400]

The Consumer Due Process Protocol suggested by the National Consumer Dispute Advisory Committee calls on arbitrators to be impartial and to comply with fairly strict arbitrator disclosure rules.[401] The AAA Consumer Rules seek to ensure that parties enjoy equal voices in choosing arbitrators by requiring the AAA to appoint arbitrators, subject to both parties' objections.[402] The proposed Consumer and Employee Arbitration Bill of Rights requires that arbitrators and administering organizations be competent, neutral, and independent.[403] These proposed rules also require that parties have "an equal voice in the selection of the arbitrator," who must comply with the AAA Code of Ethics for Arbitrators in Commercial Disputes. Arbitrators also must not have "personal or financial interest in the results," or relationships to the dispute or with parties or their counsel "that may create an appearance of bias."[404]

MH arbitration rules could mimic these models. They could borrow "equal voice" and "appearance of bias" standards. Although the meaning of "equal voice" is unclear, it seems it would require that both parties actively participate in arbitrator selection. In addition, the "appearance of bias" standard would protect arbitrator neutrality to a greater degree than current FAA § 10 review.[405]

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[399] *See, e.g.*, Conseco Fin. Corp. v. Boone, 838 So. 2d 370, 372–73 (Ala. 2002) (per curiam) (enforcing Conseco's form arbitration provision although it allowed Conseco to choose the arbitrator subject to MH consumer's consent). Even if a court finds a one-sided arbitrator selection provision substantively unconscionable, it may not invalidate the agreement if there is not sufficient showing of procedural unconscionability. Courts vary widely with respect to both of these determinations. *See supra* Part IV.B.1 (discussing divergent unconscionability cases).

[400] Congress has not enacted the Consumer and Employee Arbitration Bill of Rights or other such regulations that would preempt other state rules altering contractual provisions.

[401] Consumer Protocol, *supra* note 361, at Principle 3.

[402] AAA Consumer Rules, *supra* note 361, at C-4.

[403] S. 3210 § 2(c)(1)(A).

[404] *Id.* § 2(c)(2).

[405] The current FAA allows courts to vacate awards based on "evident partiality" of the arbitrator. Federal Arbitration Act, 9 U.S.C. § 10(a)(2) (2003). This standard is not as protective as the "appearance of bias" standard Senator Sessions suggests in this bill. *See* Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 681 (7th Cir. 1983) (emphasizing that review is very narrow under § 10 and requires parties show circumstances "powerfully suggestive of bias" in order to warrant vacating an award).

### 3. *Caps on Filing and Administrative Costs*

Commentators and courts voice significant concerns regarding high arbitration filing fees, administration costs, and arbitrator charges.[406] The Supreme Court has failed to clarify when large arbitration costs preclude a consumer from effectively vindicating statutory rights.[407] Some courts have required those with disproportionate financial power over their opponents to pay arbitration costs.[408] Courts and commentators argue this is appropriate because arbitration filing and administration costs can be substantially higher than such litigation costs, and high costs may chill claimants' assertion of statutory rights.[409] Commentators also justify imposition of arbitration costs on businesses by emphasizing the cost savings businesses often derive from their arbitration programs.[410]

Accordingly, mandatory rules could automatically shift responsibility for arbitration fees and costs to companies where claimants lack financial resources. Such rules, however, may spark frivolous claims.[411] Any rules also should not assume that all consumers lack resources or have valid claims.[412] They should take into account consumers' responsibility for court

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[406] *See, e.g.*, Schwartz, *supra* note 360, at 834–43 (focusing on the need for regulations of consumer arbitration costs); *see also* Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1483–86 (D.C. Cir. 1997) (finding that the arbitrator's fees would be "prohibitively expensive" for the employee, and subsequently requiring the employer to pay arbitrator's fees).

[407] *See* Green Tree Fin. Corp. v. Randolph, 531 U.S. 79, 90 (2000).

[408] *See, e.g.*, *Cole*, 105 F.3d at 1483–86.

[409] *See, e.g.*, Scarpino, *supra* note 141, at 701–10 (proposing that courts require businesses to pay arbitration costs in order to ease the financial burden of mandatory arbitration agreements on low-income consumers).

[410] *See* Schwartz, *supra* note 360, at 836–37 (emphasizing justifications for shifting fees to companies). One of the chief benefits companies reap from arbitration provisions is the elimination of class-action liability. *Id.* at 836. Nonetheless, even if class relief is allowed in arbitration, companies still enjoy great benefits from use of standard forms, privacy, savings on attorney fees, etc. *See infra* Part VI.C.6 (noting that it may be appropriate to allow for class relief in MH consumer arbitrations in appropriate cases).

[411] Schwartz, *supra* note 360, at 836 (noting that shifting costs to companies may force them to settle rather than face high arbitration costs, thereby "providing a windfall to consumers with tenuous claims and encouraging opportunistic consumers to file frivolous claims").

[412] *See* Alexander J.S. Colvin, *The Relationship Between Employment Arbitration and Workplace Dispute Resolution Procedures*, 16 OHIO ST. J. ON DISP. RESOL. 643, 650 (2001) (noting that, "if the company is paying the costs of arbitration, companies may fear that employees will make frequent use of arbitration, thereby increasing the costs of

costs in litigation and their savings on attorneys' fees in streamlined arbitration. An important benefit of arbitration is that it often provides a more affordable means than litigation for consumers to bring their claims.[413]

Instead of mandatory cost-shifting, regulations could require arbitration providers to develop rules that ensure "reasonable" costs for consumers.[414] The onus could be on the administering organization or the arbitrator to waive, reduce, or provide for reimbursement of arbitration fees where appropriate.[415] For example, an arbitrator could order a company to pay the arbitration costs where the consumer shows need or hardship. This would allow for flexibility to account for consumers' differing situations. It may also be wise, however, to limit arbitrators' discretion in determining what is "reasonable" by specifying costs to correspond with income levels. The aim should be to provide some uniformity or clear rules on which contracting parties may rely.

Policymakers should also consider rules preserving consumers' rights to bring claims in small claims court. Arbitration filing costs are particularly deleterious to small claims. Consumers often forego arbitration where costs of filing their claims exceed any award they may obtain in the arbitration.[416]

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the procedure for the employer"). Nonetheless, rules allowing arbitrators to shift costs back to claimants upon finding frivolity may dispel such incentive to file frivolous claims.

[413] *See* Ann C. McGinley, *Rethinking Civil Rights and Employment at Will: Toward a Coherent National Discharge Policy*, 57 OHIO ST. L.J. 1443, 1518 (1996) (proposing that arbitration "makes the process more affordable to litigants" and "permits a much faster resolution of the employment dispute, which will permit both the employer and the employee to move beyond the dispute"); Stephen A. Plass, *Arbitrating, Waiving, and Deferring Title VII Claims*, 58 BROOK. L. REV. 779, 781 (1992) ("At the same time, arbitration is generally affordable, efficient, flexible[,] and tailored to the needs of the work environment.").

[414] Consumer Protocol, *supra* note 361, at Principle 6 (stating that arbitration providers should develop programs "which entail reasonable costs to consumers based on the circumstances of the dispute, including, among other things, the size and nature of the claim, the nature of the goods or services provided, and the ability of the consumer to pay").

[415] *See* Consumer and Employee Arbitration Bill of Rights, S. 3210, 106th Cong. § 2(c)(10) (2000).

[416] *See* Budnitz, *supra* note 148, at 313 (proposing arbitration is inappropriate for small dollar claims because such claims can be resolved for less cost in small claims court); Richard B. Cappalli, *Arbitration of Consumer Claims: The Sad Case of Two-Time Victim Terry Johnson or Where Have You Gone Learned Hand?*, 10 B.U. PUB. INT. L.J. 366, 380 (2001) (emphasizing an "arbitration clause is fatal" for consumers who "will rarely be able to pursue their rights because of the unfavorable economics of arbitrating a small claim").

This is why some propose consumers should retain the right to opt out of any arbitration agreement for claims that could be brought in small claims court.[417]

Policymakers could also borrow ideas from the AAA's recently revised *Supplementary Procedures for Consumer-Related Disputes*.[418] These procedures state a fee schedule with the proviso that fees paid by consumers are refundable if the parties settle the dispute before arbitrating.[419] The schedule for administrative and arbitrator fees is based on the claim amount. For claims that do not exceed $75,000, parties pay $250 for telephonic hearings and $750 per day of in-person hearings.[420] The rules further provide that consumers share these arbitrator fees up to a maximum of $125 for claims under $10,000, and a maximum of $375 for claims up to $75,000.[421] The rules also limit companies' costs in order to preserve their efficiency benefits.[422] They allow for flexibility by giving the AAA power to reduce fees "in the event of extreme hardship," and preserving arbitrator discretion to assess or apportion fees and expenses in the award.[423]

### 4. *Convenient Proceeding Location*

Any caps on costs are meaningless when arbitration provisions require MH consumers to travel to inconvenient locations in order to vindicate their warranty rights.[424] Some courts have held unconscionable adhesion

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[417] S. 3210 § 2(c)(11) (requiring that parties have the right to opt out of arbitration for small claims).

[418] AAA Consumer Rules, *supra* note 361, at C-1(d). These rules also allow parties to bring claims to small claims court.

[419] *Id.* at *Administrative Fees.*

[420] *Id.* at C-8, *Arbitrator Fees.*

[421] *Id.* at C-8, *Fees and Deposits to be Paid by the Consumer.*

[422] *Id.* at C-8, *Fees and Deposits to be Paid by the Business.*

[423] AMERICAN ARBITRATION ASSOCIATION, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES R-43 (2003) (allowing the arbitrator to "assess and apportion the fees, expenses, and compensation related to such award as the arbitrator determines is appropriate," and to award attorneys' fees if authorized by the parties' agreement or other law); *id.* at R-49 (allowing the AAA to defer or reduce fees upon showing of hardship); *id.* at R-50 (requiring the parties to bear expenses equally unless they agree otherwise or the arbitrator assesses expenses in the award).

[424] Other commentators have suggested standards requiring convenient arbitration forums for consumers. *See, e.g.*, Budnitz, *supra* note 148, at 335–36 (proposing legislation prohibiting clauses that require arbitration in distant forums in the consumer/lender context).

agreements requiring consumers to arbitrate in inconvenient venues.[425] Other courts, however, have enforced these agreements and have held that the FAA preempts state statutes invalidating such clauses.[426]

MH consumers often lack financial resources necessary to pay arbitration filing costs, let alone any travel expenses required to arbitrate in far-off locales.[427] MH insiders, in contrast, often have offices throughout the United States, and the resources necessary to arbitrate in various locations.[428] Conseco, for example, has a multitude of offices.[429] Nonetheless, insiders often dictate in their form contracts that consumers must arbitrate claims at the insiders' headquarters.

Minimum standards for MH arbitration should ease travel burdens on consumers. Standards should provide that arbitration hearings take place in the city where the consumers reside, or another location the parties mutually choose after initiating arbitration. The standards could also be more flexible. The *Consumer Protocol*, for example, requires hearings be "at a location which is reasonably convenient to both parties" in light of travel and other "pertinent circumstances."[430] A major drawback of this approach, however, is its failure to provide clarity. In addition, it may augment delay and dissention because it requires the parties' agreement or third-party determination regarding location after disputes arise.[431]

Another option to explore is expanded use of telephonic or electronic correspondence and hearings. The AAA Consumer Rules already allow for "Desk Arbitration" (determined without hearings) and "Telephonic Hearing" (allowing parties to "tell the arbitrator about their case during a conference call").[432] The Consumer and Employee Arbitration Bill of Rights proposes

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[425] *See, e.g.*, Patterson v. ITT Consumer Fin. Corp., 18 Cal. Rptr. 2d 563, 566–67 (Cal. Ct. App. 1993) (refusing to order arbitration, in part because ITT selected arbitration rules that could require the consumer to arbitrate in a distant forum); *see also* Keystone, Inc. v. Triad Sys. Corp., 971 P.2d 1240, 1245–46 (Mont. 1998) (denying arbitration in a distant location).

[426] *See, e.g.*, KKW Enters., Inc. v. Gloria Jean's Gourmet Coffees Franchising Corp., 184 F.3d 42, 50–52 (1st Cir. 1999) (upholding a provision requiring dispute resolution in a distant forum).

[427] *See supra* note 23 (noting the low incomes of most MH consumers).

[428] *See supra* notes 107–13 and accompanying text (discussing interstate character of many MH manufacturers and lenders).

[429] *See* Conseco, *at* http://www.conseco.com (indicating major office locations).

[430] Consumer Protocol, *supra* note 361, at Principle 7.

[431] *Id.* (specifying that, if the parties do not agree, then a third-party administrator must determine the location).

[432] AAA Consumer Rules, *supra* note 361.

that telephonic or electronic hearings be allowed unless any party requests a "face-to-face hearing."[433] This may ease burdens of travel and expense. Elimination of in-person hearings, however, may impede amicable settlements and deny parties the psychological benefits of facing opponents.[434] In addition, consumers may suffer technological disadvantages in electronic arbitration.[435]

### 5. *Access to Statutory Damages and Remedies*

Companies often limit their liability and consumers' access to statutory remedies through form contracts, regardless of whether they also require arbitration. Courts generally enforce such limitations unless they find them unenforceable under a common law contract defense or consumer protection statute.[436] Courts should continue to judge enforceability of damage limitation provisions under these standards.

Nonetheless, policymakers also should consider more clearly regulating arbitration agreements that deny arbitrators' power to order punitive or statutory damages. Such damages generally seek to punish or prevent continued violations of public policies protected by statutory provisions.[437]

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[433] Consumer and Employee Arbitration Bill of Rights, S. 3210, 106th Cong. § 2(c)(4)(C) (2000).

[434] *See* Joel B. Eisen, *Are We Ready for Mediation in Cyberspace?*, 1998 BYU L. REV. 1305, 1310 (1998) (noting that the "great paradox of online mediation is that it imposes an electronic distance on the parties, while mediation is . . . designed to involve participants in direct interpersonal contact"); Carrie Menkel-Meadow, *What Trina Taught Me: Reflections on Mediation, Inequality, Teaching and Life*, 81 MINN. L. REV. 1413, 1420 (1997) ("[M]ediation promises the 'venting' of feelings and the allowance of emotions that would be inadmissible in a formal court proceeding.").

[435] *See* Richard Birke & Louise Ellen Teitz, *U.S. Mediation in 2001: The Path that Brought America to Uniform Laws and Mediation in Cyberspace*, 50 AM. J. COMP. L. 181, 211 (2002) (noting that consumers may not have sufficient access to new technology for meaningful participation in online mediation); Lucille M. Ponte, *Boosting Consumer Confidence in E-Business: Recommendations for Establishing Fair and Effective Dispute Resolution Programs for B2C Online Transactions*, 12 ALB. L.J. SCI. & TECH. 441, 470–71 (2002) (explaining that a consumer may not have technological tools, online computer time, or sufficient computer skills to participate in cyber-mediation or arbitration with companies who enjoy easy access to these resources).

[436] *See* U.C.C. § 2-316 (2004) (stating rules for enforcing warranty exclusions and modifications in contracts for sale of goods).

[437] *See, e.g.*, Cieslewicz v. Mutual Serv. Cas. Ins. Co., 267 N.W.2d 595, 599–601 (Wis. 1978) (explaining that punitive damages and, to a lesser extent, statutory multiple damages, aim to punish or deter bad conduct).

MH safety and promotion of low-income housing are important to public welfare. Furthermore, statutory damages exclusions are particularly onerous on MH warranties, and the privacy of arbitration prevents publicity of MH insiders' abuse of statutory warranty requirements. In this context, it may be appropriate for arbitrators to retain power to order statutory damages and remedies provided under applicable federal and state law.[438]

Other remedy limitations that benefit insiders are the carve-outs that MH lenders include in their form financing agreements. These carve-outs preserve lenders' rights to seek judicial foreclosure and replevin. Lenders argue that these carve-outs are fair because lenders can only afford to carry high-risk MH loans if they retain their rights to quickly foreclose on MHs in court. It is true that MH borrowers default at higher rates than conventional mortgagors, and MH repossessions have been escalating. Quick responses, however, have not aided lenders and manufacturers in recovering losses due to borrowers' defaults. Instead, lenders should aim to avoid judicial foreclosure in light of the high costs of repossessing and reselling MHs. This especially is true when MHs rapidly depreciate in value and loan amounts exceed MH resale values. Accordingly, policymakers should consider barring these carve-outs. This seems reasonable, especially if secured lenders retain rights to privately and peacefully repossess MHs under UCC Article 9.[439]

### 6. *Access to Class Relief*

A controversial issue is whether arbitrators may order class-wide arbitration. The Supreme Court dodged the question in 2003, and courts disagree regarding the enforceability of limits on class relief in arbitration.[440] Some commentators argue that access to class relief is imperative to allow consumers and employees to vindicate their statutory rights.[441] Many courts

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[438] *See* Consumer and Employee Arbitration Bill of Rights, S. 3210, 106th Cong. § 2(c)(2)(B) (2000) (proposing standard requiring the arbitrator be empowered "to grant whatever relief would be available in court under law or equity," but leaving it unclear whether this bars companies from precluding access to statutory relief).

[439] A secured lender may repossess a MH without judicial action, provided the lender does not breach the peace—*i.e.*, where a borrower has abandoned the MH, or does not object or attempt to prevent repossession.

[440] *See supra* notes 161–70 and accompanying text (discussing *Bazzle* and lingering questions regarding class arbitration).

[441] *See, e.g.*, Sternlight, *supra* note 160, at 105 (proposing that courts should not enforce arbitration provisions where plaintiffs can show "an arbitral prohibition on class

and commentators support arbitration agreements' preclusion of class relief, however, emphasizing the sanctity of contractual liberty.[442]

MH consumers often seek class relief in order to assert similar home defect claims against manufacturers. This allows those without sufficient resources to bring claims, and permits small-dollar claimants to initiate arbitration as a group.[443] Some complain, however, that consumers abuse class actions to induce large settlements.[444] Some attorneys also abuse class relief by encouraging actions to generate attorney fees.[445] Indeed there are many thorny issues for policymakers to consider in deciding whether to allow for class arbitration in MH cases.[446] This determination also depends on consumers' responsibility for arbitration fees and costs. Consumers free from high filing and arbitrators' fees will be more likely to assert statutory and low-dollar claims in individual arbitrations.[447]

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actions would deprive them of the opportunity to adequately enforce their statutory rights").

[442] *See* Izzi v. Mesquite Country Club, 186 Cal. App. 3d 1309, 1320–21 (Cal. Ct. App. 1986) (gathering cases and stating this conclusion), *superseded by statute as stated in* Villa Milano Homeowners Ass'n v. Il. Davorge, 84 Cal. App. 4th 819, 830 (Cal. Ct. App. 2000) (applying a new state statute permitting the purchaser to bring construction claims in court despite an arbitration clause in a real estate purchase agreement, but not affecting the unconscionability analysis in *Izzi*).

[443] *See* Sternlight, *supra* note 160, at 11–15 (noting how class actions allow small dollar claimants to assert their rights more economically as a group).

[444] *See* Bruce L. Hay & David Rosenberg, *"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 NOTRE DAME L. REV. 1377, 1380 (2000) (proposing that "class action in the real world is an instrument of abuse and corruption, either through sweetheart settlements that 'sell out' plaintiffs for a fraction of the value of their claims, or through blackmail settlements that extort payments from the defendant in excess of what the claims are really worth"); *see generally* Sylvia R. Lazos, Note, *Abuse in Plaintiff Class Action Settlements: The Need for a Guardian During Pretrial Settlement Negotiations*, 84 MICH. L. REV. 308 (1985) (discussing the abuse of class relief).

[445] *See* Stephen J. Safranek, *Curbing the Fees of the Class Action Lawyers in Light of* City of Burlington, 41 WAYNE L. REV. 1301, 1301–02 (1995) (noting how "lawyers abuse the class action vehicle to generate attorney fees").

[446] Consumers also complain that companies routinely remove class actions to federal courts that "almost always eventually dismiss consumer class actions." *Senator Dodd Explains Class Action Deal, Says Pact Corrects Defects in S. 1751*, 72 U.S.L.W. 22, at 2344 (Dec. 16, 2003) (discussing consumer objections to a class action reform bill).

[447] *See supra* Part VI.C.3 (discussing caps on consumers' arbitration costs).

## VII. CONCLUSION

MH arbitration is a microcosm of the larger debate regarding the enforceability and fairness of arbitration contracts in uneven bargaining contexts. Indeed, the time is ripe for Congress to consider amending the FAA to impose fairness standards for arbitrations under all non-negotiable form contracts. This may mean policymakers should take a closer look at the Consumer and Employee Arbitration Bill of Rights Senator Sessions proposed in 2000.[448]

This Article, however, tackles the MH corner of consumer arbitration because it is in particular need of reform. It is time to require minimum fairness standards for MH warranty arbitrations in order to protect MHs' potential as a formidable source for low-income housing. Policymakers cannot afford to ignore the escalation of MH warranty disputes and attendant MH foreclosures. The MHIA provides HUD with the opportunity to address resolution of intra-industry MH warranty disputes. Congress should also consider taking this opportunity to establish mandatory minimum standards for resolution of all consumer warranty claims.[449] At the very least, policymakers should seriously examine MH safety concerns and arbitration regulations aimed to ensure consumers' access to MH warranty remedies.

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[448] I am not endorsing the bill. I am merely calling on policymakers to consider fairness standards that account for the contracting reality of today's consumer contracts. *See generally* Jean R. Sternlight, *ADR Is Here: Preliminary Reflections on Where it Fits in a System of Justice*, 3 NEV. L.J. 289, 289–304 (2003) (emphasizing the need for research regarding improvement of ADR, and urging that, although we do not have "all the answers," we should "be open to new possibilities as we begin to rethink our approach to procedural justice").

[449] *See supra* Part II (discussing the confluence of factors that burden MH consumers and threaten MHs' potential in providing affordable housing).